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Technology M&A 2022

Brazil: Law and Practice
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BRAZIL

Law and Practice

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1. TRENDS

1.1 Technology M&A Market

The technology M&A market in Brazil is constantly growing and in the last 12 months the Brazilian pace has followed, or even bettered, the global trend.

The COVID-19 pandemic, despite the impacts on the economy and the challenges it brought, ended up boosting the digitalisation process and investment in technology, resulting in venture capital investments in tech-based companies surpassing the private equity ones for the first time in 2020 (BRL14.6 billion and BRL9 billion, respectively), according to a report from the Brazilian Private Equity and Venture Capital Association (ABVCAP): Inside VC 2021. In a similar vein, at the end of the first half of 2021, 339 venture capital deals had already been closed, amounting to USD5.2 billion in investments in the tech sector, according to Distrito.

1.2 Key Trends

Investments in fintech and insurtech led technology M&A both in 2020 and the first half of 2021, as investments in financial services and IT companies did in the private equity market. Alongside their industry relevance, these investments were favoured by more flexible regulatory policies from relevant Brazilian watchdogs, such as the Brazilian Central Bank, the Brazilian Securities Commission (CVM) and the Private Insurance Superintendence (SUSEP), which, among other things, have launched regulatory sandboxes frameworks.

Health, agribusiness and education are other industries that have been attracting the attention of venture capital investors in Brazil.

2. ESTABLISHING A NEW COMPANY, EARLY-STAGE FINANCING AND VENTURE CAPITAL FINANCING OF A NEW TECHNOLOGY COMPANY

2.1 Establishing a New Company

New start-ups are typically incorporated locally. At a more mature stage, usually as a condition for the closing of an investment round, certain companies are required to incorporate one or more holding companies in other jurisdictions, by means of the so-called “flip transaction”.

In terms of timing, a company can usually be incorporated in Brazil within three to five weeks, as from the initial gathering of the necessary corporate documentation.

With limited exceptions, there is no initial capital requirement in Brazil.

2.2 Type of Entity

The two most commonly used corporate forms in Brazil are limited liability companies (*sociedades limitadas*) and corporations (*sociedades anônimas*). Entrepreneurs are usually advised to choose a limited liability company for the initial incorporation, given its reduced maintenance costs and simpler structure when compared to corporations.

2.3 Early-Stage Financing

Seed investment in Brazil is usually sponsored by local investors. Following the global path, at a very preliminary stage, founders themselves (bootstrapping), family and friends are the most common capital sources. At a more advanced stage, angel investments are the typical source of funding, followed by seed funds.

Investments performed by angel investors and seed funds at these early stages are usually debt

financing, documented as convertible notes (*mútuos conversíveis*).

2.4 Venture Capital

Venture capital firms in Brazil are usually organised as investment funds, regulated by the Brazilian Securities Commission (CVM). Venture capital funds investing in Brazil are both national and foreign, although some national funds also have off-shore structures. Both national and foreign venture capital firms have been very active in Brazil in recent years.

2.5 Venture Capital Documentation

Brazil is a relatively new venture capital market, so that the documentation of this industry is in constant development and is very much inspired by foreign experience.

Despite the non-existence of a standardised documentation, Brazil is moving in this direction, mainly through the efforts made by different ecosystem players (eg, incubators, accelerators, angel associations, law firms) on creating and sharing standard agreements and/or industry practices.

2.6 Change of Corporate Form or Migration

As start-ups mature, they are typically advised to (and in most cases are required to) change their corporate form from limited liability companies (*sociedades limitadas*) to privately held corporations (*sociedades anônimas de capital fechado*), so that they can benefit from a more developed corporate governance structure and from instruments available to this corporate form, such as share classes.

Brazilian entrepreneurs are also often required to incorporate holding companies in other jurisdictions to hold the Brazilian operational start-up though a "flip transaction", especially in cases where the venture capital investor is based abroad.

3. INITIAL PUBLIC OFFERING (IPO) AS A LIQUIDITY EVENT

3.1 IPO v Sale

Historically, companies that went public in Brazil had pre-IPO valuations higher than the valuation caps typically seen in technology companies, because, when translated into US dollars, most Brazilian tech companies would be too small cap to attract the attention of most investors dedicated to Latin America and technology.

However, we have seen a surge in equity demand in Brazil in 2021 year and this has fuelled interest in IPOs, in general terms because (i) Brazil's domestic interest rates have fallen continuously throughout recent years, and (ii) the number of investors in the B3 (Brazilian stock exchange) has been consistently increasing. These factors led many companies to prepare and launch their IPOs, including technology companies. This was the first time a consistent pipeline of equity capital markets transactions, involving technology companies seeking local listings of their shares on the B3, has been seen in Brazil.

In some cases, dual track processes have been seen, but the usual path has been to go public directly, since valuations accepted by public investors have consistently surpassed valuations accepted by private equity or strategic investors.

3.2 Choice of Listing

The last five years have seen several Brazilian tech companies doing their IPOs in the USA. In 2020, several companies opted to list in Brazil, and currently it is a split market, in which unicorns and companies with larger pre-IPO valua-

tions opt to list abroad, and smaller players opt to list in Brazil. However, for the reasons explained in **3.1 IPO v Sale**, this has been changing. The demand in the Brazilian domestic market has increased and some Brazilian technology companies have concluded their IPOs in Brazil.

Also, following these trends, the CVM launched a public hearing to revamp the regulation of public offerings of securities, with a view to expanding access to the capital markets and streamlining the review and registration process for most issuers.

In addition, it can be said that the US market in general has more depth for technology ventures and is prone to offer better pre-IPO valuations than investors in other exchange markets, which attracts many potential issuers to list their shares on a US exchange.

3.3 Impact of the Choice of Listing on Future M&A Transactions

In general terms, listing on a foreign exchange would not affect the feasibility of a future sale, if this single factor is taken in isolation.

In practice, given that the companies that have opted to list on a foreign exchange opt to have this foreign exchange as the primary market for their equity securities, they have organised (or reorganised) themselves to list an entity incorporated abroad to be the listed vehicle. In these cases, a sale of control becomes more complex, given the cross-border aspect of dealing with minorities in a company incorporated outside Brazil. Depending on the jurisdiction of incorporation/domicile of the acquirer, cross-border tax aspects make the transaction even more challenging.

4. SALE AS A LIQUIDITY EVENT (SALE OF A PRIVATELY HELD VENTURE CAPITAL-FINANCED COMPANY)

4.1 Sale Process

Typically, the sale process of a privately held venture capital-financed company in Brazil is carried out as a bilateral negotiation with a chosen buyer, but auctions are becoming a more common approach as the ecosystem evolves.

M&A transactions are still the most common exit in Brazil, but, since 2020, the venture capital industry has been experiencing a boom in tech IPOs, which are on their way to being established as a viable alternative for high-performance start-ups.

4.2 Transaction Structure

In early stage deals, it is common that venture capital investors stay as shareholders in the company throughout investment rounds.

If the sale of the company is chosen as a liquidity event; however, venture capital investors usually intend to sell 100% of their stake, although the transaction structure may vary on a case-by-case basis.

4.3 Form of Consideration

The sale of a privately held venture capital-financed company is habitually for cash.

However, certain deals are carried out by means of a combination of stock and cash, especially in strategic sales involving companies in the same industry or in the event the buyer is at a pre-IPO stage and delivers its shares to the seller as part of the purchase price.

4.4 Certain Transaction Terms

Founders are expected to stand behind representations and warranties and certain liabilities, but the same is not expected from venture capital investors, given their financial drive and, particularly in the case of venture capital funds, their dissolution and liquidation following the divestment period. In view of this, the use of escrow and holdback mechanisms tend to be good alternatives to address liability issues in tech M&A deals.

Regarding representation and warranties insurance (RWI), it is still not customary to take out said coverage in M&A deals taking place in Brazil. Currently, only one insurance company is authorised to offer this product. It should be noted that RWI policies are only available to buyers and specific matters are expressly excluded from coverage (such as tax and labour liabilities).

5. SPIN-OFFS

5.1 Trends

In general, spin-offs are a useful tool generally used in the context of corporate reorganisations related to (i) pre-M&A transactions, (ii) segregation of business and/or investments, (iii) succession planning, and (iv) tax planning, unrestricted to a certain industry or sector.

The key drivers for considering a spin-off in the Brazilian technology industry are (i) the independence of segregated assets of the parent company, (ii) clear definition of ownership and rights over the IP assets and data, (iii) greater agility in developing the technology, and (iv) properly addressing regulatory matters that may impose restrictions on the transfer of certain regulated assets or services.

5.2 Tax Consequences

As a rule, spin-offs are structured in a tax-free manner if such transactions are carried out based on the book value of the divested net assets at the election of the entity undertaking the transaction. If the spin-off transaction is carried out at book value, it is less likely to trigger any adverse negative consequence at the shareholder level.

Even in the context of a business combination, a spin-off transaction should be perceived as a tax-free event once it is not supposed to trigger the recognition of a taxable income. This subject has not yet been appropriately addressed by the local tax authorities. Depending on how it is executed (ie, book value versus fair value), it can be more controversial if the spin-off is a tax-free event at the shareholder level, especially within the context of a business combination, which generally requires the transaction to be carried out at fair value.

5.3 Spin-Off Followed by a Business Combination

It is possible to execute a spin-off immediately followed by a business combination, bearing in mind the demerged portion of the company could be invested either in an existing company or in a new company.

It is unusual to perform a business combination via spin-off, one of the reasons being that the tax treatment of such a transaction is not very clear in Brazil from the perspective of the combining entities and of the shareholders.

The following key requirements set forth in Law No 6.404/1976 (Brazilian Corporations Law) must be observed by both the demerged company and the absorbing company and must be submitted for the approval of their relevant general shareholders' meetings: (i) the motives, and terms of the transaction (Justification and

Merger Protocol); and (ii) the appraisal report determining the valuation of the assets that are being subject to the spin-off.

For publicly traded companies listed in the Class A segment of the B3, Normative Ruling CVM No 565/2015 sets forth special requirements for spin-off operations, such as (i) auditing and up to date financial statements; (ii) in the case the spun-off assets are not merged into an existing company, a pro-forma financial statement of the new entity reflecting the absorption of the assets; and (iii) appraisal reports shall use fair market value or discounted cash flow as the valuation method.

5.4 Timing and Tax Authority Ruling

In general, a spin-off transaction is accomplished within one to three months.

Following the approval of the spin-off by the shareholders of the involved companies and the execution of the applicable corporate documents, the next step is the filing of such documents with the Board of Trade, followed by certain other state and municipal registrations.

It is uncommon to have spin-off transactions relying on rulings issued by tax authorities for their execution. If needed, tax rulings may take up to 12 months.

6. ACQUISITIONS OF PUBLIC (EXCHANGE-LISTED) TECHNOLOGY COMPANIES

6.1 Stakebuilding

Acquiring a stake in a public company prior to making an offer is the orthodox approach when purchasing the control of a listed company.

Under the CVM's rules, every time a shareholder purchase shares representing 5% or more of a company's capital stock it must report this, as well as when it reaches multiples of 5% (10%, 15%, and so on). This percentage falls to 1% if the shareholder is the offeror in a tender offer to purchase control of the company.

Buyers have to state the purpose of the acquisition and their plans concerning the company.

"Put up or shut up" requirements are not provided for in Brazilian law.

6.2 Mandatory Offer

Under Brazilian corporate law and CVM rules, if the controlling shareholder's stake in a publicly held company increases to one third of the free float shares, or if the controlling shareholder or the company decides to deregister and delist the company, it must launch a mandatory tender offer.

Also, some by-laws of listed companies provide for a mandatory tender offer in case any shareholder reaches a stake higher than a certain percentage set out in the by-laws, a form of takeover protection known as the "Brazilian-style poison pill".

6.3 Transaction Structures

Usually, the acquisition of a listed company is structured as a two-tiered transaction: first, the purchase of a controlling block in a private negotiation with the controlling shareholder; followed by a public tender offer to purchase the remaining shares at the same price per share paid for the controlling block.

More recently, business combinations, such as a merger of shares have become more common when the acquirer is also a listed company; this is particularly attractive in cases in which the purchaser does not have sufficient cash

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for the purchase of shares and the controlling shareholder of the purchaser agrees to the subsequent dilution of its stake in the purchaser. Last, but not least, a few transactions involving true corporations as targets being structured as tender offers launched to all shareholders have been seen.

6.4 Consideration; Minimum Price

As mentioned in **6.3 Transaction Structures**, there are a variety of structures that may be used, and an increasing trend to have stock-for-stock transactions. In a merger, cash components are not a natural feature and to extend cash, parties have resorted to more complex corporate structures to make it viable (such as the creation and issuance of redeemable preferred shares in the context of the transaction).

There may be minimum price requirements to be met, if the target by-laws have a "poison pill" provision, which requires any party that purchases or acquires shares above a certain percentage (usually varying from 15% to 35% of the total shares outstanding) to launch a tender offer for all the remaining shares, at a premium over the volume-weighted average price in a certain timeframe.

6.5 Common Conditions for a Takeover/ Tender Offer

The rules and procedures applicable to tender offers (TOs) are set forth in Instruction 361, dated 5 March 2002, as amended, issued by CVM (CVM Rule 361) and in Law No 6,404, as of 15 December 1976, as amended (Brazilian Corporations Law), which contemplates general principles for all TOs as well as specific rules applicable to different forms of TOs. They include rules:

- for delisting a publicly-held company;
- related to an increase of interest of the controlling shareholder;
- applying to sale of control of a publicly-held corporation; and
- for acquisition of control of a publicly-held company.

Any TO, including takeover offers, must be:

- intermediated by a brokerage firm or a securities dealership or a financial institution with an investment portfolio, which shall be hired by the offeror;
- indistinguishably addressed to the holders of securities of the same type and class of those that are object of the TO;
- made in a way that (i) ensures equitable treatment to offerees, (ii) conveys adequate information to them in relation to the company and the offeror, and (iii) provides them with the information necessary for a reasoned and independent decision in relation to the TO.

A TO for the acquisition of control is a type of voluntary TO (ie, it does not require prior registration with CVM), except if the offer provides for exchange for other securities.

6.6 Deal Documentation

In cash-for-stock deals, it is customary to enter into a purchase agreement, as well as to contemplate a fulsome set of representations and warranties, indemnities, conditions precedent to closing, drop-dead dates, and break-up fees when applicable.

In stock-for-stock deals, it is customary to enter into an association agreement, to contemplate fundamental representations and warranties, conditions precedent to closing, drop-dead dates and break-up fees when applicable.

6.7 Minimum Acceptance Conditions

For deregistration and delisting tender offers, at least two thirds of the shares held by minority shareholders that enrol themselves to participate

in the tender offer auction have to be tendered for the deregistration to be granted by the CVM.

For takeover tender offers, shares that, taken together with the shares already held by the bidder, total 50% plus one voting share, are the minimum acceptance condition for a successful takeover offer.

6.8 Squeeze-Out Mechanisms

If, after a successful delisting tender offer, less than 5% of the total corporate capital continues to be in the free float, the company may redeem such shares paying the same price per share offered and paid in the delisting tender offer.

6.9 Requirement to Have Certain Funds/Financing to Launch a Takeover Offer

Any tender offer must be intermediated by a financial institution, which has the obligation to extend a firm guarantee to pay the price in the settlement of the tender offer auction.

In this sense, the bidder must arrange for proper financing for the transaction, as well as offering proper liquid counter guaranties to the satisfaction of the tender offer intermediary.

6.10 Types of Deal Protection Measures

Many publicly held companies with a well dispersed shareholder base adopt protective measures against takeover. One example is the Brazilian-style poison pill mentioned in **6.2 Mandatory Offer**.

The poison pill is mechanism that attempts to frustrate a hostile takeover by a third party by stipulating an obligation for the acquirer of a certain percentage in the capital stock of a publicly traded company to launch a tender offer with payment of a premium upon the acquisition. In most cases, the poison pill trigger percentage is set at 20%.

6.11 Additional Governance Rights

Any shareholder or group of shareholders may exercise corporate control of a company if they hold the absolute majority of voting shares. As controlling shareholder, one can elect the majority of the members of the board of directors of the company, as well as prevail in any decisions to be taken by shareholders in a shareholders' meeting. There are no other governance rights specifically granted to any bidder in a tender offer that fails to "squeeze out" minorities as a result of a successful deregistration and delisting tender offer.

6.12 Irrevocable Commitments

When there is a voluntary tender offer or a delisting tender offer, it is common to have an acceptance agreement. In these agreements, it is common to have an "out" in case of price increase, if a competing takeover bid arises.

6.13 Securities Regulator's or Stock Exchange Process

Mandatory tender offers, such as in case of deregistration and delisting, and increase of stake by a controlling shareholder, and tag along rights in the case of a transfer of corporate control, need to be previously registered with the CVM and the B3. The review takes three to six months.

Voluntary tender offers, such as in the case of acquisition of control, do not need to be previously registered with the CVM. In both mandatory and voluntary tender offers, the CVM does not have the power to intervene on the price or other commercial terms of the tender offer. In the case of tender offers subject to prior registration, the CVM and the B3 perform a review of the terms and conditions from a formal and legal standpoint, seeking to ensure that the legal and regulatory requirements are met, to protect minorities in terms of proper access to information required for a decision to tender shares.

The tender offer notice must indicate the timeline for the tender offer, which may be open for a minimum of 30 days and a maximum of 45 days. Effective time to market, in case of mandatory tender offers, depends on the CVM/B3 review period.

In the case of a competing tender offer, the CVM may postpone the date of the tender offer auction that was previously launched either to establish a deadline for presentation of all proposals from any interested offerors or to determine that a single auction be carried out at the B3, setting its date, time and rules, or delegating this determination to the B3.

6.14 Timing of the Takeover Offer

The acquisition of control of companies that operate in regulated sectors may require prior approval by regulatory agencies with the mandate and jurisdiction to regulate certain industries. In several sectors, due to the fact that they are acts of the public administration, confidential treatment of the projected offer is not available. The review period of the regulatory agencies may be incompatible with the maximum period for holding the auction after the publication of the tender offer notice – 45 days – which sometimes lead the bidders to pursue a private deal with controlling shareholders, which may be subject to a condition precedent of obtaining proper regulatory approvals.

Specifically, in relation to antitrust authorities, regulation authorises the tender offer to be settled even in the absence of a final decision, in which case the political rights of the shareholders will remain suspended until the transaction is vetted.

7. OVERVIEW OF REGULATORY REQUIREMENTS

7.1 Regulations Applicable to a Technology Company

Other than regulated activities that may impose operating licensing requirements (such as those of financial institutions), Brazil is a fairly open market for tech companies and would not require a prior licence to begin activities.

7.2 Primary Securities Market Regulators

The Securities and Exchange Commission (CVM) is the primary securities market regulator.

7.3 Restrictions on Foreign Investments

Foreign entities must register their investment in Brazilian companies with the Brazilian Central Bank. Restrictions on foreign investment are very limited, such as those applicable to radio and TV broadcasting entities.

7.4 National Security Review/Export Control

Import and export transactions are subject to regulation by the Internal Revenue Service (IRS), the Foreign Trade Secretariat (SECEX) and, when specific approval is required, other Brazilian ministries and regulatory agencies.

Therefore, to perform import and export transactions to Brazil, the company must obtain a Register of Export and Import (REI), as well as a register in the RADAR System, which allows the company access to the online National Integrated System for International Commerce (SISCOMEX) by means of the Foreign Trade Sole Portal (PUCOMEX).

Export transactions to Brazil may also be subject to the imposition of regulatory restrictions or roadblocks and, therefore, may require the

issuance of licences by Brazilian ministries or regulatory agencies.

Accordingly, the federal government provides a list of goods that are currently subject to the requirement of a previous licence, depending on their *Nomenclatura Comum do Mercosul* (NCM), an eight-digit code used to identify the nature of the goods. For example, certain chemicals and biological items, munitions, pharmaceuticals, vitamins, cosmetics and medical equipment/devices will be subject to prior licensing.

Imported goods are submitted to customs inspection, which varies from a standard to an in-depth analysis, depending on the channel of customs clearance. If, during the export control procedures, Brazilian authorities verify non-compliance with Brazilian legislation, penalties may apply, such as warnings, fines, forfeiture of goods and in a worst-case scenario, the suspension or prohibition of performing foreign trade operations. Finally, violations of foreign trade law may also trigger criminal liabilities.

7.5 Antitrust Regulations

According to Brazilian Antitrust Law (Law 12.529/2011), any transaction will be subject to mandatory notification to CADE when (i) the transaction has effects in Brazil, (ii) the transaction is deemed by Brazilian law to be an economic concentration, and (iii) the revenues of the groups involved exceed the thresholds provided by law.

Regarding the effects test, a transaction will be considered as having effects in Brazil when it takes place in Brazilian territory, or when it takes place abroad, but the target has or will have direct and/or indirect presence in Brazil. Direct presence is usually achieved through local assets, a local subsidiary or a local sales representative or distributor. Alternatively, indirect presence in Brazil is achieved by virtue of export sales into the country. There is no de minimis rule for assessing the indirect presence of the target – therefore, any sale to Brazil is sufficient to meet the criterion in question, regardless of its volume or value.

As to the definition of economic concentration, it is quite broad according to Brazilian legislation, encompassing all transactions which result in the following:

- the merger of two previously separate companies;
- the acquisition of control over a company, in whole or in parts (by means of the acquisition of shares, quotas, tangible or intangible assets, etc); and
- associative agreements or joint ventures between companies.

According to CADE's Resolution No 2/2012, the acquisition of a minority shareholding may be considered an economic concentration – and therefore be subject to mandatory notification – in the following cases.

- In cases where the target is not a competitor or active in a market vertically related to the buyer's activities:
  - (a) an acquisition of 20% or more of the total or voting capital of the target; or
  - (b) if the buyer already owns 20% or more of the total or voting capital, any acquisition of shares provided that the interest acquired from at least one seller taken individually, equals or exceeds 20% of the total or voting capital.
- In cases where the target is a competitor or active in a vertically related market to the buyer's activities:
  - (a) an acquisition of 5% or more of the total or voting capital of the target; or
  - (b) the most recent acquisition which results in an increase in ownership interest at or

above 5%, if the buyer previously owned 5% or more of the capital of the target.

In order to fulfil the revenue threshold, at least one of the economic groups involved in a transaction (seller or buyer) must have registered gross revenues in Brazil in excess of BRL750 million (approximately USD142 million) and at least one of the other groups involved must have registered gross revenues in Brazil in excess of BRL75 million (approximately USD14.2 million), in the fiscal year prior to the transaction.

7.6 Labour Law Regulations

In Brazil, all employers and employees are represented by a labour union. As a rule, the labour union cannot extend its representation to non-employers or non-employees (eg, independent contractors). The classification of labour union depends on (i) the employer's economic sector (eg, metalwork, oil and gas, automotive, electronic, commerce, etc), and (ii) the geographic territory in which the employer and employees operate. There is only one labour union for employers (union of employers) and one labour union for employees (union of employees) in a given economic sector and geographic territory (union class). All labour unions are required by law to have a collective bargaining agreement. The employer may bargain directly with the union of employees, in which the collective bargaining agreement will affect only that employer and its employees. Employers and employees are not required to pay union dues. All employers and employees are represented by a labour union, but they do not necessarily need to become members. If they become a union member, the union may charge membership fees. Brazil does not have work councils, but labour law provides for other types of employees' representation depending on the company's size and economic activities, such as the Internal Committee for Accident Prevention (CIPA).

7.7 Currency Control/Central Bank Approval

There are some foreign exchange controls related to the outflow and inflow of funds to and from abroad. However, no authorisation from the Central Bank of Brazil is required for an M&A transaction.

8. RECENT LEGAL DEVELOPMENTS

8.1 Significant Court Decisions or Legal Developments

The authors of this article are not aware of relevant court decisions or legal development arising directly out of technology M&A in the past three years. However, there have been court decisions and developments in related-matters that may be relevant to the tech industry when strategising their M&A transactions.

Liability for third party content: Brazilian courts have consolidated the position that the application providers should not be liable for user generated content unless they fail to comply with a court order determining the removal of content.

- Company representation in Brazil: Brazilian Courts have held that the Brazilian affiliate of a foreign tech company has standing to be sued on behalf of the foreign parent company without the need of service by letter rogatory.
- Applications for transportation: some city councils have enacted local laws to prevent the use of online providers of private car rides in their cities; however, the Supreme Court has ruled that laws prohibiting the use of such applications violate the constitutional rights of free enterprise and free competition and therefore held those local laws unconstitutional.
- Marketplace liability: Brazilian courts are split in this topic; some courts have held that the

marketplace providers are liable for defective goods sold by third parties because they integrate the supply chain, while other courts have held that marketplace providers are mere intermediaries between sellers and buyer, thus not liable for defective goods/services.
- Port numbers: The Superior Court of Justice has recently ruled that online companies should store not only IP addresses but also "port numbers" as a way to identify users who may have shared the same IP address on a same given time and date.
- Encryption: Brazilian courts have upheld the legality of encryption, but there are two constitutional actions before the Supreme Court, which are pending judgment, discussing the consequences of the non-disclosure of the content of communications due to encryption; two justices of the court have ruled in favour of the lawfulness of encryption, but the other justices have not voted yet.

9. DUE DILIGENCE/DATA PRIVACY

9.1 Technology Company Due Diligence

Under applicable Data Privacy regulations, certain data processing principles must be observed, such as "necessity" and "purpose". In other words, controllers shall not process data unless there is a clear reason for it, and provided that the process is carried out with the aim of achieving such stated reason or purpose. The principle of transparency also mandates that data subjects be informed about how controllers process their data, and with whom their data may have been shared. Consequently, uploading documents containing personally identifiable information (PII) should be made with care, and when disclosing PII is not absolutely required for the purposes of the envisaged transaction, PII should be redacted or eliminated from such documents. In theory, in competitive processes, all bidders receive the same level of information. When it comes to technology due diligence, in most cases, privacy and cyber-related matters are subject to fundamental representations and warranties, and general Q&A provided for in the context of due diligence requests. In-depth review of cyber-policies, systems, applications and data governance are not common practice.

9.2 Data Privacy

Sharing or disclosing PII in the context of due diligence must be avoided for the reasons explained in **9.1 Technology Company Due Diligence**, unless there is a fundamental reason to disclose/share PII for the purpose of the envisioned transaction. As the Brazilian Data Privacy laws are inspired by European legislation (GDPR), similar processing limitations involving Brazilian data sets shall be observed.

10. DISCLOSURE

10.1 Making a Bid Public

A bid is required to be made public whenever the bidder intends to initiate the process for the tender offer, so that the board of directors may have the chance to review it, and, in cases where the tender offer needs to be registered with CVM, when the bidder submits the request for registration of the tender offer (ie, if the offer is combined with a deregistration and delisting of the target company, or if the tender offer is payable with shares of the bidder).

10.2 Prospectus Requirements

Any bidder must publish a tender offer notice (*edital*), with all the terms and conditions applicable to the tender, according to CVM Rule 361.

The tender offer notice to be published for launching requires information on the conditions of tender, number of shares targeted, price,

acceptance procedures, reasons for the tender offer and certain information concerning the target company.

Additionally, if the tender offer is made by the company itself, the controlling shareholder, any members of management or parties related to them, and a valuation report (*laudo de avaliação*) of the target company must be produced, except in the case of a tender offer for the sale of control.

10.3 Producing Financial Statements

Bidders in tender offers do not need to produce their own financial statements as part of the bid.

Parties that intend to approve a business combination through a merger or amalgamation need to produce pro forma financial statements and submit this as part of the materials to be reviewed by shareholders in the context of the merger.

10.4 Disclosure of Transaction Documents

The Tender Offer instrument must be disclosed to the market, in the form of a public notice (*edital*).

11. DUTIES OF DIRECTORS

11.1 Principal Directors' Duties

The principal directors' duty in a business combination is to act in the best interest of the company, irrespective of the individual interest of one or more (majority) shareholders. As a matter of fact, Brazilian directors are legally forbidden to act on the interests of those shareholders who appointed them. The Brazilian Corporate Law sets forth the fiduciary duties of the company's officers, which are to act with diligence, loyalty and care, and also to observe the common good and the social purpose of the company. As a consequence, the directors shall ensure the stakeholders' interests as a whole and must also (i) seek the best exchange ratio, as the case may be; and (ii) observe commutative and arm's length conditions for the transaction. Also, a director who has a conflict of interest with the transaction shall refrain from the resolutions to be taken on this matter.

11.2 Special or Ad Hoc Committees

Within the context of non-group companies, it is not common to establish special or ad hoc committees for business combinations. On the other hand, when the transactions involve controlling, controlled or companies under common control, the establishment of such committees is more usual. Indeed, the CVM has issued Orientation No 35, which provides several recommendations to directors in the context of such transactions, one of them being the creation of special or ad hoc committee to negotiate the transaction and advise the board of directors, to avoid conflicts of interest and guarantee that the transaction is performed under commutative conditions. It is also recommended that such committees are composed of (i) independent directors' of the companies; (ii) non-directors independent members; or (iii) one director chosen by the majority of the board of directors, one advisor elected by the non-controlling shareholders and one director chosen by both members.

11.3 Board's Role

The board is not usually actively involved in negotiations or in defending the company, being bound by its advisory role.

A minority shareholder directly harmed by the acts of the management may file an individual lawsuit aiming to be directly indemnified by the managers pursuant to the Brazilian Corporations Law. However, this type of lawsuit is unusual, considering that the shareholders generally suf-

fer indirect damages while the company is the one directly harmed by the acts of managers.

Lawsuits filed by the company itself are more common. Upon prior deliberation of the general shareholders' meeting, the company may file a civil liability action against the managers, for the damage caused to its assets. This type of action is relatively common.

Pursuant to the Brazilian Corporations Law, shareholders holding at least 5% of the corporate capital are entitled to file a lawsuit against the managers of the company to recover losses caused to the company, if the general shareholders' meeting of the company has not approved the filing of such lawsuit.

In this context, managers will only be held personally liable for their business decisions if they act with fault, intent to cause harm or in violation of the law or the companies' by-laws.

Furthermore, the shareholder or third party harmed by the negligent, wilful or illegal action of the manager may file a direct action for damages against such manager.

It should also be stressed that the Brazilian Superior Court of Justice has consistently held that that the approval of the directors' accounts without reservations by the general shareholders' meeting, unless cancelled, exempts the directors from any liability, unless an action for annulment of the general shareholders' meeting is filed.

11.4 Independent Outside Advice

Outside advice in connection with a takeover or a business combination is usually requested from legal and financial advisors. CVM Orientation No 35 (mentioned in **11.2 Special Ad Hoc Committees**) provides that the directors shall assess the necessity or convenience of hiring such advisors for helping in the negotiations and in the decision-making process. If the advisors are hired, officers shall ensure that their opinion are fair, independent, supervised, and expressly justified by specified and transparent criteria.

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Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados has a Technology, Innovation and Digital Business team focused on assisting companies to model and implement their digital strategy. The team's knowledge is a result of its handling of leading and complex cases, giving it the expertise to support clients and provide them with tailored services, respecting their particularities and business needs. Members have expertise in all key aspects of the technology industry, such as the regulatory framework for internet infrastructure, corporate and tax advice, litigation, data protection risk assessment, data compliance programmes, legal advice on digital platforms and marketplace, and streaming services.

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