



The Guide to Mergers and Acquisitions

Editors

Paola Lozano and Daniel Hernández

The Guide to Mergers and Acquisitions

First Edition

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Publisher's note

Latin Lawyer is delighted to publish *The Guide to Mergers and Acquisitions*.

Edited by Paola Lozano and Daniel Hernández of Skadden, Arps, Slate, Meagher & Flom LLP and containing the knowledge and experience of more than 40 leading practitioners, it provides guidance that will benefit all practitioners acting in Latin American mergers and acquisitions.

M&A activity in Latin America has grown significantly in recent decades and deals are increasingly complex. This guide draws on the expertise of highly sophisticated practitioners to provide an overview of the main elements of deal-making in a region shaped by its cyclical economies and often volatile political landscape. Its aim is to be a valuable resource for business-people, investors and their advisers as they embark on an M&A transaction.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide Mergers and Acquisitions*. If you find it useful, you may also like the other books in the Latin Lawyer series, including our *Guide to Corporate Compliance and Regulators*, our online tool that provides an overview of the major regulators in Latin America.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

Rosie Cresswell, *Deputy Publisher*

Part III

New Transaction Dynamics and Evolving Trends in Latin America

7

Public M&As, Hostile Takeovers and Shareholder Activism

Francisco Antunes Maciel Müssnich, Monique Mavignier and Ana Paula Reis¹

Historically, stock markets in Latin America have shown much lower trading volumes than their counterparts in developed countries. With businesses driven primarily by family groups,² investment funds and entities controlled by local governments, for most of the population trading shares was, and to a certain extent still is, a distant reality.

At the turn of the millennium, legislation and regulatory reforms brought about a dramatic change in that reality for some Latin American countries. In 2008 and 2009, for example, propelled by the Stock Market Law of 2006,³ the Mexican National Banking and Securities Commission (CNBV) undertook a process of internal and regulatory restructuring that, together with new legislation, made the Mexican securities market more accessible, attractive and transparent, overcoming the crisis it faced in the 1990s. On 23 August 2015, the market value of the Mexican stock market hit US\$478.8 billion, exceeding the Brazilian stock market, which traded \$471.6 billion on that day.⁴

Brazil's story is much like Mexico's. After legislative and regulatory reforms,⁵ in 2007 alone, 64 companies were listed on B3 SA – Brasil, Bolsa, Balcão (B3), formerly known

1 Francisco Antunes Maciel Müssnich and Monique Mavignier are partners and Ana Paula Reis is a senior associate at BMA Barbosa Müssnich Aragão.

2 ARMOUR, John; JACOBS, Jack B. and MILHAUPT, Curtis J. *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*. Vol. 52, N.º 1, 2011, pp. 273–274.

3 Ley del Mercado de Valores of 2006, published in the Diario Oficial de la Federación on 30 December 2005. The legislation was updated in 2007, 2014, 2018 and 2019. Available at <https://www.cnbv.gob.mx/Normatividad/Ley%20del%20Mercado%20de%20Valores.pdf>. Accessed on 8 September 2020 at 7:30 a.m.

4 3 'Bovespa deixa de ser maior bolsa da América Latina, superada por México'. *O Globo*. São Paulo. 23 September 2015. Available at: <http://g1.globo.com/economia/mercados/noticia/2015/09/bovespa-deixa-de-ser-maior-bolsa-da-america-latina-superada-por-mexico.html>. Accessed 5 September 2020 at 5:00 p.m.

5 Notable contributions to the reform include Law 10.303 (31 October 2001), which made the Comissão de Valores Mobiliários – CVM an independent government agency linked to the Ministry of the Treasury, having its own legal personality and assets and financial and budget autonomy, with status as an independent administrative

as BM&Fbovespa. That milestone may be matched or even exceeded in 2020, given that, by August of 2020, more than 45 IPOs were registered and plenty more were in the pipeline.

Nonetheless, most stock markets in Latin American countries are still developing and suffer from lack of depth and poor liquidity. The development of the equity capital markets in these countries would not only be relevant to foster the local economy, but could also represent a significant increase in M&A transactions involving public companies.

This article discusses three key components of public company activity, namely (1) IPOs and dual listings, (2) hostile takeovers and (3) shareholder activism, with the hope of providing some insight as to the current state of affairs in Latin America and expected trends for the near future. This article will heavily focus on Brazil, as one of the few markets in the region with sufficient depth and liquidity to offer critical mass of actual examples and dynamics on these issues.

Initial public offerings and dual listing

When a window of opportunity opens and the market timing is ideal – in other words, when management and the controlling shareholders believe that the cost of capital raised by issuing shares will be less compared to other types of financing, especially traditional financing involving banks – companies will turn to the equity markets to raise money through public offerings of shares.

When considering an initial public offering, market timing cannot be assessed in isolation. Aside from technical market issues, the decision to go public involves questions that depend on the company's owners (such as their inclination to assume risk), and the costs of legal and regulatory compliance in the country where the IPO will be made, among other factors.

Just like in 2007, Brazil in 2020 appears to have perfect market timing for companies to raise money in the equity market. As shown by data from Brazil's securities regulator, the Securities and Exchange Commission (CVM), the queue of companies that intend to go public this year continues to grow, and currently stands at almost 50 companies from all sectors, including the real estate sector, which alone accounts for more than 12 applications for registration of public offerings.⁶

Not only is the quantity of offerings impressive, but for the first time Brazilian start-ups are in the process of listing on the B3. Such listings are common in the US and Chinese equity markets, where businesses in the initial stages of their development are financed by venture capital and private equity funds, which use the stock market to allow investors to exit the venture.

authority, whose senior personnel are appointed for fixed terms and are not removable at will; CVM Instruction 323 (19 January 2000) – types of abuse of control and serious infractions; CVM Instruction 333 (6 April 2000) – illegal transactions on the securities market; CVM Instruction 358 (3 January 2002) – disclosure of material facts; CVM Instruction 361 (5 March 2002) – procedure for tender offers for shares in public companies; CVM Instruction 367 (29 May 2002) – declarations by persons elected to the board of directors of public companies; CVM Instruction 380 (23 December 2002) – procedures for trades on stock exchanges and over-the-counter markets made via internet; and CVM Instruction 390, (8 July 2003) – trading in their own shares by public companies by means of trades in options.

6 Available at: <http://sistemas.cvm.gov.br/?ofertasdist>. Accessed 5 September 2020 at 6:20pm.

In Brazil, however, the phenomenon is rare. Most of the time, startups wait until they have greater scale and maturity, and then try listing in the United States. PagSeguro and Stone are good examples: the former made its IPO on the New York Stock Exchange and the latter on Nasdaq.

From 2018 to 2019, 12 Brazilian companies launched IPOs.⁷ Five opted for the New York equity markets: XP, Afya Educacional, Stone, PagSeguro and Arco Educação.⁸ PagSeguro, a payment service provider, raised around US\$2.27 billion in its IPO on Nasdaq. The offering was the largest any Brazilian company had made since BB Seguridade went public in Brazil in 2011, and the largest on Nasdaq since Snap's IPO in March 2017.⁹

Given an extremely liquid market and low interest rates, it seems Brazil's startups have decided to launch their IPOs, transforming the B3 into a Brazilian Nasdaq, which is favoured by technology and internet companies. As at October 2020, more than five tech startups had filed the prospectus for their IPOs with the CVM.¹⁰

As the equity markets in the region become more mature, the social and economic transformations that occur in a globalised and increasingly competitive world demand a reconsideration of local legislation, such as the rules on multiple voting shares. For decades, good corporate governance supported the 'one share, one vote' model, but in recent years there has been a strategic change in global business, and many jurisdictions, with different legal systems, have departed from the absolute application of the one-to-one rule.

In Argentina, for example, a company's by-laws can give each common share up to five votes. Once a company has obtained authorisation to make an initial public offering, however, it can no longer issue 'super voting' shares (article 216, Law 19550, the Ley de Sociedades Comerciales).

Conversely, Brazilian corporations are not permitted to issue multiple voting shares under local corporation law. The Brazilian ban on multiple shares was initially established in 1932 by Decree-Law No. 21,536/1932.¹¹ This was repeated in Decree-Law No. 2,627/1940¹² and the prohibition is still present in the current Brazilian corporation law (Law No. 6,404/1976).¹³

Multiple voting shares are common in the United States. For example, as a means to avoid pressure for short-term results, Facebook, LinkedIn, Groupon, Google and other

7 The other seven are Banco Inter, Hapvida Participações and Notre Dame Intermédica (in 2018) and Grupo SBF, C&A Modas, Banco BMG and Vivara (in 2019).

8 'Ações de brasileiras em Nova York operam bem acima de seus preços de estreia na bolsa'. *Valor Investe*. 8 July 2020. Available at: <https://valorinveste.globo.com/mercados/internacional-e-commodities/noticia/2020/07/08/acoes-de-brasileiras-em-nova-york-operam-bem-acima-de-seus-precos-de-estreia-na-bolsa.ghtml>. Accessed 8 September 2020, at 10:00 am.

9 PagSeguro, which belongs to UOL, a Brazilian content, technology and digital services company, raised \$2.3 billion in its IPO in New York. *Bloomberg*, 24 January 2013 edition.

10 The two most recent prospectuses were filed by Vittia, a fertiliser and biological pesticides company, and the laser waxing company MPM Corpóreos. Applications to register offerings have also been filed by e-commerce site Enjoei, real estate rental platform Housi and Mosaico, which owns e-commerce content sites Zoom, Buscapé and BondFaro.

11 Article 1, Paragraph 4, of Decree-Law No. 21,536/1932.

12 Article 80, Sole Paragraph, of Decree-Law No. 2,627/1940.

13 Article 110, Paragraph 2, of the current Brazilian corporation law.

Silicon Valley names resorted to dual class shares in their IPOs, giving the founding shareholders enhanced voting powers, sometimes up to 150 times greater than those given to new investors. The reasoning behind the dual-class model is that the founding shareholders are those who are most interested in, and committed to, the company's long-term success. Silicon Valley has thus favoured a system in which there are two groups of shares: Class A shares, which are subject to the proportional voting system and are freely traded on the market, and Class B shares, which carry super voting rights and are held by long-term investors. Class B shares can be traded on the market, but if they are, they lose their super voting rights.

At present, provisions like Section 313.00 of the NYSE Listed Company Manual prohibit corporate actions or issuances that could disparately reduce or restrict the voting power of publicly traded common stock, such as the issuance of super voting stock. The provision does, however, generally allow shares with differentiated voting rights to be issued in the following scenarios, among others: prior to or as a result of an IPO; after an IPO has been made, as long as the new shares have the same characteristics as existing shares; the issuance of lower-vote stock; pursuant to certain hostile takeover defences, such as US poison pills; and upon de-listing.

Various jurisdictions have converged in offering super voting powers as a kind of 'reward' for loyalty or entrepreneurship to shareholders that are long-term investors in the business. Although it may seem strange under the 'one share, one vote' rule, giving greater weight to the vote of those who devote more time and money to the business, can be a beneficial solution for companies that face financial problems or that need their founders' drive to continue growing.

To understand the benefits of multiple voting for the economy, imagine a start-up or family business that is looking for investors to finance one of its projects. The founders do not want to sell their shares since – within the implacable logic of article 110, Section 2 of Brazil's Corporations Law – they would lose their control over the company. If multiple voting rights were allowed under Brazilian law, so that political power over the company could be dissociated from economic power, it would be much easier for such start-up or family business to welcome new investment. The investors rely on the founders' know-how and expertise and are ultimately interested in the profit that their investment can generate. Paul Rodel makes just this point: 'The goal of this structure is to make it possible for the company to raise capital by offering shares on public markets without sacrificing the control of visionary insiders who are focused on the long term.'¹⁴

On the other hand, there are jurists like Nelson Eizirik (who, despite asserting categorically that '[i]n Brazil, the legislation on companies does not accept multiple voting rights')¹⁵ recognises that '[t]he concept of "one share, one vote" is beginning to show signs of weakening, because of the success of companies that have adopted multiple voting shares'.¹⁶

14 Paul Rodel. 'Dual class share voting structures for listed companies: are they here to stay?' Rome: Securities Law Committee – IBA Annual Conference, 19 July 2018, pp. 1–2.

15 Nelson Eizirik. *A Lei das S/A v.2*, 2.ed. São Paulo: Quartier Latin, 2015, p. 176. Our translation

16 Nelson Eizirik. *A Lei das S/A v.2*, 2.ed. São Paulo: Quartier Latin, 2015, p. 176 (footnote 6). Our translation.

Relaxing the ‘one share, one vote’ principle is not a threat if it is introduced with certain safeguards, such as maximum voting differentials, limitation of share classes, sunset clauses and mandatory corporate governance measures. In dual voting structures, it is expected an optimal arrangement between investors and founders. Investors who acquire dual class shares companies are willing to accept a corporate governance framework that is exposed to potential agency costs, while founders can strike a deal that presents an optimal level of voting differentials and economic benefits for each share class, with transparency and active involvement of shareholders in the decision.

In Brazil, corporate governance practices have significantly improved in the last 20 years¹⁷ and various instruments and remedies are available for the protection of minority shareholders and investors, including, for example, the obligation of companies listed in Novo Mercado to have a Board of Directors composed of at least two directors or 20 per cent of members who qualify as independent directors (whichever is greater), with unified term of office of at most two years.

Despite its proscriptive legislation, Brazil may be closer to adjusting to international standards than it might seem. There is currently a bill before Brazil’s Congress¹⁸ – an initiative of the Ministry of the Economy in partnership with market participants, that would amend Law 6404/1976 (the Corporations Law) to include a new article 110-A, making it possible to create one or more classes of common shares with multiple voting rights, within certain limits.

A potential change in the Brazilian legislation would be welcome not only as an escape valve available to companies in financial difficulty, or to ensure that business’ founders will remain in the company, but above all because it would bring Brazil in line with the global trend. Multiple voting rights represent an opportunity for companies to receive new investment in an effective, more efficient way.¹⁹

Beyond the multiple voting discussion, there is evidence of a desire by the Brazilian retail equity investors for a broader supply of attractive stocks in the Brazilian stock market. In August 2020, the CVM issued CVM Resolution 3, making it easier for Brazilian investors to acquire Brazilian Depositary Receipts (BDRs), certificates traded on B3 that represent shares issued by foreign companies traded in other countries. The certificates may also be backed by debt securities traded in other countries and issued by foreign companies or Brazilian companies registered with the CVM, shares issued outside Brazil by foreign issuers, or units in exchange-traded funds (ETFs) traded in foreign markets.

This new option for the general investing public reflects not only the desire of Brazilian companies listed outside the country to obtain access to local Brazilian investors, but also a growing demand for new types of investments. With exponential growth in the number of individuals investing in the stock market, it is natural to see demand for more diverse

17 Corporate governance practices, for example, improved notably in the 2004–2009 period, due to two main factors:

(1) growth in Novo Mercado and Level 2, mainly through the entry of new companies with high corporate governance practices, and (2) improvement in the governance practices of the companies that were already listed, including in some cases migration to a higher listing level.

18 Drafted by Nelson Eizirik, Luiz Alberto Colonna Rosman and Francisco Antunes Maciel Müssnich.

19 Note that documentation, negotiations and terms of dual structures tend to be effective but also more complex.

investments to meet different investor profiles. As at August 2020, B3 had 2,958,422 individual investors, a significant increase from 557,109 individual investors in 2015.²⁰

This sudden increase in the number of individual investors is also the result of a favourable scenario created by cuts in the Selic rate – the basic interest rate in the Brazilian economy – which in 2020 hit 2 per cent per year, the lowest in Brazil's history and close to the United States's basic interest rate. This new reality has reduced earnings from the more conservative investments that Brazilians generally prefer, giving a significant boost to the equity market.

The high point hit by the Mexican stock market on 23 August 2015 has not been translated in a sustained level of growth of the market in the following years and the Brazilian stock market continues to be the largest in Latin America. Brazil is thus unique, with legislation and regulations designed to accommodate transactions and trading in listed companies that is quite rare in its neighbouring countries. This has helped finance the inorganic and accelerated growth of Brazilian listed companies. Some sectors, such as real estate and technology, have experienced a considerable concentration in the past years resulting from multiple M&A transactions entered into by listed companies using proceeds from IPOs, follow-ons and other market transactions.

Hostile bids and takeover defences

In economic crises such as the one brought on by covid-19,²¹ widely held companies tend to become the target of hostile takeovers by others that had ample capital prior to the crisis (meaning the unsolicited offer for the acquisition of one company (called the target company) by another (called the raider) that is accomplished by going directly to the company's shareholders or fighting to replace management to get the acquisition approved).

In Latin America, including Brazil, hostile takeovers are still rare because most public companies have a controlling shareholder or controlling group.²² Amid political and economic uncertainties, it is not possible to assert with any conviction that the Brazilian and other regional markets are converging towards a system of dispersed control, as defined by Berle and Means.²³

However, the market and practitioners cannot ignore the fact that the approximately 52 listed companies in Brazil that do not have defined control can become the target of competitive tender offers, capturing market and media attention, and frequently experiencing unprecedented hikes in the price of their stock.

20 B3's Individual Investor Profile History (Histórico de Perfil dos Investidores Pessoas Físicas), available at: http://www.b3.com.br/pt_br/market-data-e-indices/servicos-de-dados/market-data/consultas/mercado-a-vista/historico-pessoas-fisicas/. Accessed 5 September 2020 at 4:30 pm.

21 See Chapter 1 of this guide for further analysis of the impact of the covid-19 pandemic on M&A transactions in Latin America.

22 According to the CVM's market bulletins, available at <http://www.cvm.gov.br/publicacao/boletimmercado.html>, the number of companies without a defined controlling shareholder does not show a linear progression: in 2017, there were 59; in 2018, 52; and in 2019, the number grew once again, to 58.

23 BERLE JR., Adolf A., and MEANS, Gardiner C. *The Modern Corporation and Private Property*. New Brunswick, Transaction, 2010, p. 38.

Furthermore, despite their small number, every dispute that arises in connection with M&A transactions involving listed companies, and the decisions made in connection with those disputes, tends to become emblematic, and a reference for the entire market.²⁴ In more mature and deep markets with a tradition of corporate litigation rooted in common law, hostile takeover and other M&A-related litigation is prevalent. In fact, that healthy body of judicial precedent is what has defined the law of public company M&A in states like Delaware, which inform considerations that Latin American regulators and market participants adopt, even if somewhat modified and adapted.

In Brazil, one of the largest hostile takeover processes began with the admission of Eletropaulo Metropolitana Eletricidade de São Paulo SA to the Novo Mercado listing segment in 2017,²⁵ at which time all of its shares of capital stock became common shares (in accordance with the listing segment's rules), dispersed among investors in the company. At the end of the same year, Eletropaulo showed interest in making a public offering of shares, as one of the alternatives available for financing its operations and the development of its business.²⁶

In the absence of defined control in Eletropaulo, on 5 April 2018,²⁷ Energisa S.A. made its first voluntary tender offer to acquire all of the shares in Eletropaulo. The dispute for control of Eletropaulo was fought between Energisa SA, Neoenergia SA²⁸ and Enel Brasil Investimentos Sudeste SA. The latter ultimately acquired Eletropaulo, in an auction held on 4 June 2018.²⁹ The competitive process not only resulted in exponential increases in the

24 The history of hostile offers in the Brazilian market is scanty: in addition to the cases discussed in this article, in 1971, Macrossul tried to obtain control of Sulbanc, but failed; in 1978, after the current Brazilian Corporations Law had come into effect, Luz Cataguazes made a public tender offer for control of CEMIG; Perdigão's frustrated attempt to gain control of Sadia occurred in 2006; and the hostile takeover of GVT by Vivendi occurred in 2009. (CARVALHOSA, Modesto. *Comentários à Lei de Sociedades Anônimas*, 4^a ed., vol. 4: tomo II, São Paulo: Saraiva, 2011, p. 250); Cataguazes and CEMIG (CARVALHOSA, Modesto. *Comentários à Lei de Sociedades Anônimas*, 4^a ed., vol. 4: tomo II, São Paulo: Saraiva, 2011, p. 251); Sadia and Perdigão (Caso Sadia - Perdigão é sinal de evolução do mercado, *Valor Econômico*, 24 July 2006 edition); Vivendi and GVT (Vivendi surpreende a Telefônica e acerta a compra do controle da GVT, *Estadão*, 14 November 2009 edition).

25 Statement of Material Fact, Eletropaulo Metropolitana Eletricidade SA, 12 September 2017: admission of the company to the Novo Mercado segment: <http://siteempresas.bovespa.com.br/consbov/ArquivoComCabecalho.asp?motivo=&protocolo=579257&funcao=visualizar&Site=C>.

26 Statement of Material Fact, Eletropaulo Metropolitana Eletricidade SA, 29 November 2017: public offering of shares: <http://siteempresas.bovespa.com.br/consbov/ArquivoComCabecalho.asp?motivo=&protocolo=587911&funcao=visualizar&Site=C>.

27 Statement of Material Fact, Eletropaulo Metropolitana Eletricidade SA, 5 April 2018: public offering of shares: Public Tender Offer for Common Shares in the Company made by Energisa S.A.: <https://www.rad.cvm.gov.br/ENET/frmExibirArquivoIPEExterno.aspx?NumeroProtocoloEntrega=607093>.

28 Statement of Material Fact, Eletropaulo Metropolitana Eletricidade SA, 5 April 2018: public offering of shares: Public Tender Offer for Common Shares in the Company made by Neoenergia SA: <https://www.rad.cvm.gov.br/ENET/frmExibirArquivoIPEExterno.aspx?NumeroProtocoloEntrega=611848>.

29 Statement of Material Fact, Eletropaulo Metropolitana Eletricidade SA, 04/06/2018: result of the auction for acquisition of control of Eletropaulo: <https://www.rad.cvm.gov.br/ENET/frmExibirArquivoIPEExterno.aspx?NumeroProtocoloEntrega=626969>.

trading price of shares in the target company, as shown in the following table, but resulted in enhanced regulation and competition without precedent in the Brazilian market.

Variation in trading price of eletropaulo shares during the competitive process ³⁰	
Date	Price
12 September 2017	BRL 16.01
4 April 2018	BRL 19.27
4 May 2018	BRL 34.17
4 June 2018	BRL 44.76

More recently, in March 2020, Eneva announced a proposal to merge with AES Tietê, a step that would have required the approval of the shareholders of both companies, Brazil's anti-trust authority, CADE, and the National Electrical Energy Agency – ANEEL.³¹ In April 2020, AES Tietê's board of directors announced it had rejected the proposal, which was deemed to be hostile.³² In addition, AES Holdings Brasil Ltda (AES Tietê's controlling shareholder and the holder of a majority of the common shares in the company, although it does not hold a majority of the company's capital) stated in a letter sent to the company's management that the offer 'could not be implemented without the approval of a majority of the holders of common shares in the Company'.³³ Given the potential dispute over the rights of AES Tietê's preferred shareholders arising out of the fact that the company is listed on B3's level 2 corporate governance segment, Eneva opted to withdraw its offer.³⁴

Also, in 2020, Gafisa began a hostile takeover process to acquire Tecnisa, in which a merger was the first alternative, prior to a voluntary tender offer for control of the company.³⁵ The shareholders with more sizeable holdings in the target mobilised, however, and worked together to convince the other shareholders to block the transaction Gafisa hoped to achieve. According to a source within Tecnisa, the group opposing Gafisa's offer represented about 45 per cent of the votes against the transaction.

The dispute between Gafisa and Tecnisa is not yet over. Indeed, the episode is a clear example of how companies with dispersed ownership concern themselves with developing techniques to defend against different types of hostile takeovers – whether at the management's initiative, or due to listing requirements. In the *Gafisa/Tecnisa* case, Tecnisa's by-laws provide that any shareholder that attains a holding of 20 per cent or more of the company's capital must, within 60 days, make a public tender offer to acquire the shares

30 Source: http://www.b3.com.br/pt_br/market-data-e-indices/servicos-de-dados/market-data/cotacoes/.

31 Statement of Material Fact, Eneva SA, 1 March 2020: proposed business combination with AES Tietê: <https://www.rad.cvm.gov.br/ENET/frmExibirArquivoIPEExterno.aspx?NumeroProtocoloEntrega=741928>.

32 Statement of Material Fact, AES Tietê Energia AS, 19/04/2020: board's decision – proposed business combination: <https://www.rad.cvm.gov.br/ENET/frmExibirArquivoIPEExterno.aspx?NumeroProtocoloEntrega=755135>.

33 Statement of Material Fact, AES Tietê Energia SA, 20/04/2020: letter from controlling shareholder: <https://www.rad.cvm.gov.br/ENET/frmExibirArquivoIPEExterno.aspx?NumeroProtocoloEntrega=755192>.

34 Statement of Material Fact, Eneva SA, 21 April 2020: proposed business combination with AES Tietê: <https://www.rad.cvm.gov.br/ENET/frmExibirArquivoIPEExterno.aspx?NumeroProtocoloEntrega=755388>.

35 Tecnisa se articula para barrar a Gafisa. *Valor Econômico*. 27 August 2020 edition.

held by all other shareholders. This defence tactic is commonly referred to among Brazilian professionals as a poison pill, which is more sobriquet than a technical name, given the conceptual differences between the Brazilian version and the US heavily used and broadly litigated instrument of the same name.³⁶

Anti-takeover measures can be classified as preventive actions or counteractions, depending on when they are undertaken.³⁷ Preventive actions are taken prior to any attempt at a hostile takeover, and are designed to protect the company against unwanted new shareholders with significant holdings, such as poison pills, staggered boards or poison puts (provisions in debt instruments granting the right of the instrument holder to sell the bonds back to the target). Counteractions, in turn, are taken after a hostile takeover attempt has been initiated, on an ad hoc basis.³⁸ In both cases, anti-takeover measures can take different forms, and can be implemented through the company's by-laws, by contract, or through institutional devices, by creating entities, sometimes with their own legal standing.³⁹

To exemplify the difference in scope, consider that more than 15 poison pills implemented by listed companies in the United States in the months of March and April 2020, in response to the adverse impacts of the covid-19 pandemic.⁴⁰ The same did not occur in Latin American countries, which is not surprising given the small number of hostile takeovers it has experienced.

Brazilian pills generally involve standard by-law provisions,⁴¹ imposing an obligation to make a public tender offer to all shareholders whenever any shareholder's holding reaches a certain threshold, such as 15 per cent, 20 per cent or 25 per cent of the company's float.⁴²

In addition, Brazilian companies' by-laws tend to have accessory provisions designed to ensure the effectiveness of their main defensive clauses, particularly relating to instances in which the public tender offer provided for in the by-laws is required to be made. Various companies' by-laws, for example, provide that shareholders that fail to comply with the

36 A poison pill in the United States essentially consists of plans granting shareholders the right to acquire shares at a deep discount, effectively diluting the purchaser upon completing a hostile takeover.

37 CLARK, Robert Charles. *Corporate Law*. Boston / Toronto, Little Brown and Company, 1986, p. 571.

38 Some of the United States's most prevalent defences include the Pac-Man defence (where the target turns around and attempts a hostile takeover of the hostile buyer), the white knight defence (where the target is sold to a more desirable purchaser instead of the hostile buyer), the white squire defence (where a block of voting instruments is sold or issued to a friendly player), the crown jewel defence (where the most valuable assets of the target are sold to make it less desirable to the hostile buyer) or the greenmail defence (repurchasing stock in the target already held by the hostile buyer).

39 COMPARATO, Fábio Konder; SALOMÃO, Calixto Filho. *O Poder de Controle na Sociedade Anônima*. 4. ed., Rio de Janeiro: Forense, 2005, p. 145.

40 Debevoise & Plimpton. Coronavirus Resource Center. Exhibit A – Selected Recent Stockholder Rights Plans, 2020, p. 4. Accessed on 8 September 2020 at 11 am: file:///C:/Users/arsb/Downloads/20200409%20Rethinking%20Poison%20Pills%20Again.pdf.

41 NASCIMENTO, João Pedro Barroso do. *Medidas Defensivas a Tomada de Controle de Companhias*. São Paulo: *Quartier Latin*, 2011, pp. 150–151; GORGA, Erica. 'Changing the Paradigm of Stock Ownership: From Concentrated Towards Dispersed Ownership? Evidence from Brazil and Consequences for Emerging Countries.' 3rd Annual Conference on Empirical Legal Studies Papers. Abr. 2008, pp. 47–48.

42 CARVALHOSA, Modesto. *As Poison Pills Estatutárias na Prática Brasileira: alguns aspectos de sua Legalidade*. In: CASTRO, Rodrigo R. Monteiro; ARAGAO, Leandro Santos de. *Direito Societário: Desafios Atuais*. São Paulo: Quartier Latin, 2009, p. 25.

defensive provisions will have their shareholder rights suspended, as provided for in article 120 of the Brazilian Corporations Law. Others set forth maximum voting clauses or restrictions on voting by a single shareholder.⁴³ Standstill agreements are not commonly used, though, most probably due to the restricted role of company's management on hostile bids – management is required to opine, but may not contract on behalf of shareholders, who may choose to accept or not a hostile offer.

Even so, in companies having defined control, the controlling and the minority shareholders' views on how the company's business should be conducted may not be aligned, resulting in impasses on important decisions to be made at shareholders' meetings. In companies that have more dispersed capital, in which traditional control (50 per cent plus one share) does not exist, 'minority control' can arise, creating a situation where such conflicts are even more frequent, with significant shareholder initiatives opposing management. In such a context, activist shareholders can attract the spotlight, and sometimes take on a leading role in the company.

Shareholder activism

Activist minority shareholders are much more common in the United States and in Europe: evidence of shareholder activism in Latin America is still scarce, even in its largest economy, Brazil. Undoubtedly, the high concentration of share ownership contributes to the low level of activism in Brazil.

In the United States, shareholder activism has been studied in the context of Commercial Law since the last century. Authors like Black (1998),⁴⁴ Gillan and Starks (1998),⁴⁵ Karpoff (2001),⁴⁶ Partnoy and Thomas (2007)⁴⁷ and Coffee and Palia (2016)⁴⁸ demonstrate that shareholder activism has shown significant growth in that country,⁴⁹ generating different strategies, such as 'sell the company activism', 'return the cash activism', 'change the board activism' and 'operational improvement activism', implemented through tactics such as tender offers, proxy fights and 'wolf-packing'.

The role played by proxy advisory firms, which specialise in giving public recommendations on governance matters that will be submitted at shareholders' meetings, can have

43 As an example: Embraer S.A. and B3 S.A. – Brasil, Bolsa, Balcão.

44 BLACK, Bernard. S. 'Shareholder activism and corporate governance in the United States'. In: Newman, P.K., (Ed.) *The New Palgrave Dictionary of Economics and the Law*. Basingstoke: Macmillan – now Palgrave Macmillan, 1998, pp. 459–65.

45 GILLAN, Stuart. L. and STARKS, Laura T. 'A survey of shareholder activism: Motivation and empirical evidence'. *Contemporary Finance Digest*, 2 (3), 1998, pp. 10–34.

46 KARPOFF, Jonathan M. 'The impact of shareholder activism on target companies: A survey of empirical findings' (Working paper). University of Washington, 2001.

47 COFFEE, John C. and PALIA, Darius. *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*. *Annals of Corporate Governance*: 2016, Vol. 1: No. 1, pp 1–94.

48 See John C. Coffee Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545 (2016).

49 BRANTON. William W.; MCCAHERY, Joseph A. *Institutional Investor Activism: Hedge Funds and Private Equity, Economics and Regulation*. Oxford University Press, 2015, p. 40.

a decisive effect on the vote cast by investors, making it possible for activists to attract a greater number of shareholders to their position.

In Brazil, the Corporations Law provides for certain positions in a company's management to be held by its minority shareholders, who, as investors in the business, have a legitimate interest in monitoring the conduct of the company's affairs, taking part in decisions, and, if necessary, inspecting the management of the company by appointing members of the fiscal council. Against such a legal backdrop, companies that hinder minority shareholders by failing to follow good corporate governance practices compromise their image in the market and in the media in general.

Since the 1990s, institutional investors in the Brazilian market, especially pension funds, seem to have adopted a strategy of ensuring that they have a strong presence in the share ownership structure, with constant monitoring of companies' business and of governance in the companies' internal structures.⁵⁰

More recently, shareholder activism has enabled investors who believe that the future lies in sustainable business to use their influence to require officers and directors to ensure that their company's practices are consistent with sustainability and positive social impact, resulting from the adoption of environmental, social, and corporate governance principles (ESG). Institutional investors such as BlackRock have publicly adopted strategies that prioritise investment in companies committed to ESG.⁵¹

Notwithstanding the positive aspects of shareholder activism indicated above, one should always bear in mind that activists do not necessarily aim at long-term investments or have a true capital commitment with the company they invest. Empty voting, as it has been called worldwide when the economic interest in the company does not reflect, proportionally, the voting power, has been experienced in Brazil, and may lead to decisions not necessarily aligned with a company's and its shareholders' long-term views.

With a view to aligning Brazilian practices with those of the member countries of the Organisation for Economic Cooperation and Development, the CVM issued CVM Instruction 627/2020. The new rule sets out a scale of percentage holdings that minority shareholders must have in order to seek reparation for losses caused by management, through actions such as: bringing a derivative action against members of management, calling a general meeting of shareholders, requiring information from the Fiscal Council and requesting information from members of management.

Although the change is positive in the sense that it promotes shareholder activism, the CVM has jurisdiction only over matters involving corporate law and the securities market, with powers to bring administrative enforcement proceedings and impose sanctions against

50 CRISÓSTOMO, Vicente Lima e González, Eleuterio Vallelado. 'Possível estratégia de ativismo de fundos de pensão no Brasil'. *Revista Econômica Contemporânea*, Rio de Janeiro, Vol. 10, 2006: pp. 139–155. Available at <https://www.scielo.br/pdf/rec/v10n1/06.pdf>.

51 For example, Larry Fink, Chair of the Board of Directors and CEO of BlackRock, recently wrote a letter to BlackRock's investors, stating that investment awareness is changing rapidly, and he believes that the world is on the brink of a fundamental reshaping of finance toward ESG objectives. Available at: <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

parties that violate CVM regulations, the Brazilian Corporations Law, or the Capital Markets Law (Law 6385/1976).

Even so, the CVM's enforcement efforts are becoming one of the main ways shareholders have found to obtain reparation when their rights are infringed. Every year, the CVM brings numerous enforcement proceedings against individuals and companies. In the second quarter of 2020 alone, for example, the total amount of fines issued by the CVM was 9.58 million reais, against 20 accused parties. In 2019, fines imposed by the CVM came to more than 1 billion reais.⁵²

Nonetheless, given the CVM's limited scope of action, many investors and shareholders still must turn to the courts to recover losses caused by members of management and controlling shareholders who act contrary to the law. In fact, Brazil's courts have held that the civil liability of management and of controlling shareholders can be dealt with in the same way, since both are subject to the same principles established in the Constitution with respect to the country's economic order.⁵³ Controlling shareholders are therefore subject to the same action in civil liability provided for in the Brazilian Corporations Law with respect to members of management.

It should also be noted that the lack of shareholder activism can be harmful not only to companies and shareholders exposed to wrongful practices by management and controlling shareholders, but to society at large. Shareholder absenteeism is a common phenomenon in the Brazilian market. In fact, the *Petrobras* case is an excellent illustration, and shows that promoting activism in defence of minority shareholders should be a priority in Brazil.⁵⁴

Brazil's recent history has been tarnished by business scandals, with criminal charges and sentences involving individuals and institutions from both the public and the private sectors. These episodes have affected the value and credibility of some of the company's largest listed companies. As a solution, or at least a palliative measure, mechanisms for enforcement of Brazilian investors' rights is essential, given the general perception that the current legal regime is far from offering adequate means for the protection of investors.

It is precisely for this reason that the independence rules under the Novo Mercado listing regulation are so important. A company's board of directors should act as a counterweight to management, in order to ensure that the company's business is conducted in an independent fashion, by qualified managers, avoiding the need for the company and its investors to use the mechanisms that are available to obtain reparation of losses – and that aim is more likely to be realised in boards where there is a significant number of independent members.

52 Comissão de Valores Mobiliários – CVM. Relatório de Atividade Sancionadora CVM: 2º trimestre (abril–junho) 2020, p. 13. (CVM Enforcement Activities Report: 2nd quarter (April–June) 2020). Accessed 5 September 2020 at 2pm: http://www.cvm.gov.br/export/sites/cvm/publicacao/relatorio_atividade_sancionadora/anexos/2020/20200903_relatorio_atividade_sancionadora_2o_trimestre_2020_versao_resumida.pdf.

53 FRAZÃO, Ana. Função Social da Empresa – repercussões sobre a responsabilidade civil de controladores e administradores de S/As. São Paulo: Renovar, 2011, pp. 248–249.

54 GORGA, Érica. 'Considerar Petrobras vítima de corrupção é rasgar leis'. Folha de São Paulo, São Paulo, 14 August 2015 edition. Mercado. Available at: <http://www1.folha.uol.com.br/mercado/2015/08/1668646-considerar-petrobrasvittima-da-corrupcao-e-rasgar-leis-diz-advogada.shtml>.

In Brazil, there are no legal means to hold companies liable for disclosing false information to the market, differently from the class actions available in the United States, for example. Only controlling shareholders and management have liability, based on articles 117, 155, and 157 of the Corporations Law. Nonetheless, there is nothing to prevent opting for corporate arbitrations to deal with potential liability and reparation. Novo Mercado companies are required by the listing regulation, for example, to adopt arbitration as the means of resolving corporate disputes.⁵⁵

Still, the use of arbitration to resolve disputes is not free from criticism and concerns. The main concern, certainly, is the supposed confidentiality of arbitral proceedings: in litigation that can involve hundreds of parties, to what extent can confidentiality be assured? And, above all, given the importance of the matters in dispute, to what extent is it appropriate for the market and for society to allow significant disputes to remain confidential? It is too early to assert that the benefits of confidentiality outweigh the potential harm of concealing the matters in dispute and how they are decided.^{56,57}

Conclusion

Mergers and acquisitions involving listed companies, together with shareholder activism, are inexorable movements that are intimately related to the development of a country's securities market. Although there is good reason to believe that a new wave of hostile takeovers and shareholder activism will be postponed until the public health situation and the market stabilise, there is also good reason to believe that businesses' M&A and corporate development divisions, banks, investment funds, and other market participants are currently working to identify potential targets and corporate governance structures to be developed through public markets.

In this context, discussions have been raised in some markets to evaluate the legal and regulatory models and, possibly, establish a dual voting system to allow structures that accommodate the concentration of power to founders or founding groups in certain industries, such as technology companies.

In Latin America, there would be no reason to be different: offering this type of alternative has become a requirement not to lose competitiveness of the listing environment for companies with high-growth potential, in a context of increasingly fierce competition. It has become urgent to bring this discussion to the context of the local markets, considering,

55 Article 39 of the Novo Mercado Regulation provides that the bylaws of companies listed on the segment must contain an arbitration clause requiring the company, its shareholders, the members of its management, and the members of its fiscal council (if any) resolve any and all disputes between them by arbitration before the Market Arbitration Chamber (CAM-B3).

56 CAM-B3 has recently launched an initiative to give greater publicity to decisions made by its arbitrators by means of summaries of their decisions available at: http://www.b3.com.br/pt_br/b3/qualificacao-e-governanca/camara-de-arbitragem-do-mercado-cam/ementario/.

57 Note to authors: please consider adding more focus on shareholder activism in the context of M&A transactions. There may not be much in the region, but the article could include the theory and mention a few examples, even if only showing early signs of activism. The recent Casino – Pão de Açúcar – Exito dealings may be a good example to comment. We also understand that there are funds that have shown signs of activism in the context of M&A in recent years, such as Tempo Capital and Cartica Capital.

above all, the growing importance that those companies would have in their economic scenarios, and the need to maintain their competitiveness as compared to other main global financial centres.

Moreover, there can be no doubt that officers and directors of public companies will gain a considerable head start over their competitors by reviewing their corporate governance structures and reassessing measures to defend against hostile takeover bids.

Although the shareholding structures in most Latin American countries do not show much similarity to shareholding patterns in companies based in Europe and North America, the debates and disputes that arise in acquisitions of public companies have left a permanent mark on the legal and economic agendas of the jurisdictions in which they occur – not least because of the publicity that must by law be given to material issues involving public companies.

These public transactions are directly related to opportunities for companies to go public in local stock markets and, while they are in course, they are subject to active participation by shareholders, minority or not, in how the deal is conducted and whether (and how) a hostile bid will be fought off.

Increasingly, transparency, fairness, accountability, and corporate responsibility, especially in relation to ESG principles, will be given more weight by investors when deciding where to put their money. Because of these and other factors discussed in this brief review, corporate governance is taking on a prominent role both before and after companies go public, imposing itself on corporate agendas and becoming a priority for management.

Appendix 1

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Edited by Paola Lozano and Daniel Hernández of Skadden, Arps, Slate, Meagher & Flom LLP, and containing the knowledge and experience of more than 40 leading practitioners, *The Guide to Mergers and Acquisitions* provides guidance that will benefit all practitioners acting in Latin American mergers and acquisitions.

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