

Public M&As, Hostile Takeovers and Shareholder Activism

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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 US\$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). That milestone may be matched or even exceeded in 2021, given that, by the end of 2021, 35 IPOs were registered.

However, Brazil is at the dawn of a new era with the revisions made by the Brazilian Securities and Exchange Commission (CVM) on the procedures for Initial Public Offerings, Reference Form filings and accessory obligations, which were inserted at the beginning of 2022 by the consolidation of normative acts.

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 chapter 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 chapter 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, in 2021 Brazil had perfect market timing for companies to raise money in the equity market. As shown by data from Brazil's securities regulator, the CVM, the queue of companies that intended to go public in 2021 grew significantly.[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.

In Brazil, however, the phenomenon is rare. Most of the time, start-ups 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 2021, 77 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] There are also situations in which the company chooses to go public through dual listings: for example, Azul, a Brazilian airline company, went public in 2017 at B3 (AZUL4) and at Nyse (AZUL), raising 2.02 billion reais in total.

Given an extremely liquid market and low interest rates, it seems Brazil's start-ups have decided to launch their IPOs, transforming the B3 into a Brazilian Nasdaq, which is favoured by technology and internet companies. As at July 2021, more than eight tech start-ups had registered and filed the prospectus for their IPOs with the CVM.[10] This alternative has become even more attractive with the recent regulatory updates of the Brazilian Securities and Exchange Commission, which held a public hearing to improve the regulations on Brazilian Depositary Receipts (BDRs), aiming, as a result, to foster trading in the Brazilian market of securities listed abroad.[11]

Although the public hearing is still ongoing, the current rules offer good opportunities for those interested in investing in large foreign companies without having to resort to the international market. Currently, B3 makes around 836 BDRs available,[12] among which are renowned brands in the American market such as the American pizzeria Dominos's (D2PZ34),

operated in Brazil by BK Brasil; Pinterest (P2IN34), a photo social network that works as an inspiration board for users; Vimeo (V2ME34), a video-sharing site; and the GoDaddy platform (G2DD34), a domain registration and website hosting company.

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.[13] This was repeated in Decree-Law No. 2,627/1940[14] and the prohibition is still present in the current Brazilian corporation law (Law No. 6,404/1976).[15] However, at the beginning of 2021, Provisional Measure No. 1,040 was issued, bringing changes to Brazil's business and corporation environment. This provisional measure was converted into law in August 2021, writing a new page in the history of companies going public in the country. The referred law establishes that multiple voting shares may be issued prior to a company's listing in the stock exchange – not being allowed, though, for companies which shares are already traded in the market or as a result of a corporate reorganisation involving a publicly listed company without multiple voting shares. The proposal also limits multiple votes to 10, and has a sunset clause of seven years, extendable for any period if decided by shareholders not holding multiple voting shares, provided that withdrawal rights are guaranteed for dissenting shareholders.[16]

The change in Brazilian legislation made by Law No. 14,195/2021 is welcome not only as an escape valve available to companies in financial difficulty, or to ensure that business founders remain with the company, but above all because it would bring Brazil in line with global trends. Multiple voting rights represent an opportunity for companies to receive new investment in an effective, more efficient manner.[17]

Multiple voting shares are common in the United States. For example, as a means of avoiding pressure for short-term results, Facebook, LinkedIn, Groupon, Google and other 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.'^[18]

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')^[19] 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'.^[20]

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 past 21 years,^[21] 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.

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 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 investments to meet different investor profiles. As at July 2022, B3 had 5,243,325 individual investors, a significant increase from 1,505,022 individual investors in 2021.[22]

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' 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 American. 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,[23] 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.[24] 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.[25]

However, the market and practitioners cannot ignore the fact that approximately 58 listed companies in Brazil, by 2019, did not have defined control, which made them and will continue to make them the target of competitive tender offers, capturing market and media attention, and frequently experiencing unprecedented hikes in the price of their stock.

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.[26] 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,[27] 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.[28]

In the absence of defined control in Eletropaulo, on 5 April 2018,[29] Energisa SA 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 SA[30] and Enel Brasil Investimentos Sudeste SA. The latter ultimately acquired Eletropaulo, in an auction held on 4 June 2018.[31] The competitive process not only resulted in exponential increases in the 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[32]

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 antitrust authority, CADE and the National Electrical Energy Agency – ANEEL.[33] In April 2020, AES Tietê's board of directors announced it had rejected the proposal, which was deemed to be hostile.[34] 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'.[35] 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.[36]

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.[37] 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 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 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.[38]

Further, on 14 January 2021, BR Malls Participações SA, a publicly held company listed in B3's Novo Mercado, with widespread capital, received an unsolicited and non-binding proposal from Aliansce Sonae Shopping Centers SA, one of the largest shopping mall management companies in Brazil, also listed in B3's Novo Mercado. The proposal regarded the combination of both companies' businesses, through a merger of the shares issued by brMalls, which was rejected by brMalls' board of directors.

Upon rejection of the proposal, Aliansce Sonae started acquiring shares issued by brMalls and, on 18 February 2022, Aliansce Sonae sent a letter to brMalls informing of the acquisition of a relevant stake (Aliansce Sonae had acquired 5.05 per cent of brMalls' capital).

On 14 March 2022, Aliansce Sonae disclosed a material fact improving the terms of the proposal. Considering that the business combination was well received by the majority of both companies' shareholders and the market in general, Aliansce Sonae also informed that it was going to start the procedures to formalise this new proposal and convene a shareholders' general meeting of brMalls. The new proposal was also rejected by brMalls' board of directors.

Aiming to hinder Aliansce Sonae, on 30 March 2022, brMalls submitted a complaint to initiate an administrative procedure before the Brazilian Administrative Council of Economic Defense (CADE) requiring, among other claims, that the exercise of all political rights of the Aliansce Sonae Group's equity interests of brMalls be suspended provisionally until CADE has properly analysed the competitive effects of said share acquisitions.

On 18 April 2022, brMalls received a third proposal from Aliansce Sonae, with new amendments, and brMalls' board of directors authorised the company's officers to proceed with the negotiations. brMalls' officers presented the final version of the protocol and justification of the transaction, the purpose of which is to establish the conditions under which the parties intend to promote such transaction, to the board of directors, which approved the execution of the protocol on 28 April 2022.

On the eve of the annual general meeting of brMalls, held on 29 April 2022, CADE resolved in favour of Aliansce Sonae, to the effect that the political rights arising from the brMalls shares held by Aliansce Sonae could be exercised, provided they were limited to 4.99 per cent of the voting capital. Accordingly, Aliansce Sonae and other shareholders, through cumulative voting, appointed a new Board of Directors of brMalls.

On 8 June 2022, the shareholders of brMalls and Aliansce Sonae approved the combination of their businesses, in their respective extraordinary general shareholders meetings. The transaction consists of the merger of shares issued by brMalls into a wholly owned subsidiary of Aliansce Sonae, with (1) the issuance of class A and B non-voting shares, the class B non-voting shares being immediately redeemable, and (2) the subsequent merger of the company with Aliansce Sonae. The transaction is subject to conditions precedent, set out under the protocol and justification.

Anti-takeover measures can be classified as preventive actions or counteractions, depending on when they are undertaken.[39] 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.[40] 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.[41]

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.[42] 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,[43] 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.[44]

Furthermore, 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 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.[45] 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.

In addition to such measures, target companies, their shareholders and management can deploy alternative strategies before administrative authorities seeking the enforcement of certain laws that could impede the hostile offer from moving forward, for example, the need to obtain prior

regulatory approval as a condition for closing.

Hence, target companies have already launched antitrust defences to block unsolicited proposals. Companies can claim substantive issues (such as claiming that the transaction would lead to detrimental effects on competition), use the regulatory provisions to stop the buyer from exercising rights on shares they already own, or cause significant delay capable of making the raider lose interest in the deal.

CADE has already dealt with some cases involving antitrust defence in unsolicited transactions. Shortly after the enactment of the pre-merger review, CADE issued a decision where CBC could not exercise the political rights of a certain amount of shares from Forjas Taurus acquired on the stock exchange market. CADE was also called into action in the case involving the acquisition of Veolia's shares by Suez. More recently, brMalls sought an injunction from CADE to stop Aliansce Sonae from exercising any political rights in the context of its unsolicited proposal of combination (see above).

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),^[46] Gillan and Starks (1998),^[47] Karpoff (2001),^[48] Partnoy and Thomas (2007)^[49] and Coffee and Palia (2016)^[50] demonstrate that shareholder activism has shown significant growth in that country,^[51] 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 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.[52]

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.[53]

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 the former CVM Instruction 627/2020, which is now CVM Resolution 70/2022. The 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 parties that violate CVM regulations, the Brazilian Corporations Law, or the Capital Markets Law (Law 6385/1976).

Even so, in 2019 and 2020 the CVM's enforcement efforts were 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. However, this scenario seems to be turning around. In 2021 the fines imposed by the CVM reached 19.3 million reais, against 83 defendants. On the other hand, 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, and in 2019, fines imposed by the CVM came to more than 1 billion reais.[54]

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.[55] 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.[56]

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.

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.[57]

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.[58]

Additional information Law No. 14,195[59]

Law No. 14,195 promotes legislative changes with the aim of fostering the business environment and improving Brazil's position in the Doing Business ranking, developed by the World Bank. Among the changes, Law No. 14,195

included provisions in the Brazilian Corporate Law with new protections to minority shareholders, applicable primarily to publicly-held companies, such as (1) expansion of matters reserved to the general shareholders meeting; (2) change of the rule for convening general shareholders meetings; (3) prohibition to combine the positions of CEO and chairman; and (4) the mandatory participation of independent directors on the boards. It is expected that, with such measures, the business environment will become more attractive to investors.

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 multiple voting shares system 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, 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.

>>>This article was written by our partners Francisco Müssnich (Chico), Monique Mavignier, and Ana Paula Reis, and belongs to The Guide to Mergers & Acquisitions - Third Edition, published by Latin Lawyer.

Notes

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[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, No. 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 16 August 2022 at 2021 pm.

[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 5.00pm.

[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 authority, whose senior personnel are appointed for fixed terms and are not removable at will; CVM Resolution 35 (26 May 2021) – illegal transactions on the securities market and procedures for trades on stock exchanges and over-the-counter markets via internet; CVM Resolution 44 (23 August 2021) – disclosure of material facts; CVM Resolution 85 (31 March 2022) – procedure for tender offers for shares in public companies; CVM Resolution 80 (29 March 2022) – declarations by persons elected to the board of directors of public companies; and CVM Resolution 77, (29 March 2022) – trading in their own shares by public companies by means of trades in options.

[6] Available at: <http://sistemas.cvm.gov.br/?ofertasdist>. Accessed 16 August 2022 at 8.10 am.

[7] id.

[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 16 August 2022 at 2.35 pm.

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

[10] The two most recent prospectuses, in July 2021, 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] 'CVM lança audiência pública sobre regras de BDR'. Comissão de Valores Mobiliários. 16 August 2022 at 2.40pm: <https://www.gov.br/cvm/pt-br/assuntos/noticias/cvm-lanca-audiencia-publica-sobre-regras-de-bdr#:~:text=A%20Comiss%C3%A3o%20de%20Valores%20Mobili%C3%A1rios,alterar%20a%20Instru%C3%A7%C3%A3o%20CVM%20480>.

[12] Available at: http://www.b3.com.br/pt_br/produtos-e-servicos/negociacao/renda-variavel/bdrs/bdrs-nao-patrocinados/bdrs-nao-patrocinados-listados. Accessed 18 August 2022 at 4.06pm.

[13] Article 1, Paragraph 4, of Decree-Law No. 21,536/1932.

[14] Article 80, Sole Paragraph, of Decree-Law No. 2,627/1940.

[15] Article 110, Paragraph 2, of the current Brazilian Corporation Law.

[16] Multiple voting shares will have an initial term of up to seven years, extendable for any period, provided that: (1) the approval of the extension by the company's shareholders occurs; (2) holders of multiple vote shares are excluded from voting; and (3) dissenting shareholders, in cases of extension, are assured the right to withdraw.

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

[18] 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.

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

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

[21] 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.

[22] B3's Individual Investor Profile (Perfil dos Investidores Pessoas Físicas), available at:
https://www.b3.com.br/pt_br/market-data-e-indices/servicos-de-dados/market-data/consultas/mercado-a-vista/perfil-pessoas-fisicas/faixa-etaria/.
Accessed 18 August 2022 at 4.09 pm.

[23] See Chapter 1 of this guide, 'Roundtable: The Impact of Political Instability and Social Unrest on Dealmaking in Latin America', for further analysis of the impact of the covid-19 pandemic on M&A transactions in Latin America.

[24] 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.

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

[26] The history of hostile offers in the Brazilian market is scanty: in addition to the cases discussed in this chapter, in 1971, Macrossul tried to obtain control of Sulbancor, 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*, 4ª ed., vol. 4: tomo II, São Paulo: Saraiva, 2011, p. 250); Cataguazes and CEMIG (CARVALHOSA, Modesto. *Comentários à Lei de Sociedades Anônimas*, 4ª 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).

[27] 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>.

[28] 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>.

[29] 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/frmExibirArquivoIPEEExterno.aspx?NumeroProtocoloEntrega=607093>.

[30] 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>.

[31] 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>.

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

[33] 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>.

[34] 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>.

[35] 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>.

[36] 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>.

[37] Tecnisa se articula para barrar a Gafisa. Valor Econômico. 27 August 2020 edition.

[38] 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.

[39] CLARK, Robert Charles. Corporate Law. Boston/Toronto, Little Brown and Company, 1986, p. 571.

[40] 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).

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

[42] Debevoise & Plimpton. Coronavirus Resource Center. Exhibit A – Selected Recent Stockholder Rights Plans, 2020, p.4. Accessed on 8 September 2020 at 11 am:

<https://www.debevoise.com/insights/publications/2020/04/rethinking-poison-pills-again>.

[43] 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.

[44] 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.

[45] As an example: Embraer S.A. and B3 S.A. – Brasil, Bolsa, Balcão.

[46] 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.

[47] 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.

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

[49] 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.

[50] 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).

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

[52] 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>.

[53] 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>.

[54] 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 16 August 2022 at 5:30 pm:
<https://www.gov.br/cvm/pt-br/centrais-de-conteudo/publicacoes/relatorios/relatorio-de-atividade-sancionadora/relatorio-de-atividade-sancionadora-cvm-2022-1o-trimestre-versao-resumida>.

[55] 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.

[56] 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-petrobras-vitima-da-corrupcao-e-rasgar-leis-diz-advogada.shtml>.

[57] 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).

[58] 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/.

[59] This may change depending on the President's vetoes to the provisional measure proposed text, still to be announced.

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