
Brazil

Takeover Guide

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THE REGULATION OF TAKEOVERS

Under Brazilian law, takeover bids (*ofertas públicas para aquisição de ações* or OPAs) are unilateral declarations of will through which the bidder expresses, for a specified period, their commitment to acquire a number of shares of a certain publicly held company at a specified price through an auction to be carried on Brasil, Bolsa, Balcão (B3) SA, the Brazilian stock exchange, pursuant to certain terms and conditions established in a takeover notice (*edital*, the Notice).

In Brazil, takeover bids are regulated by the Brazilian Securities and Exchange Commission (Comissão de Valores Mobiliários or CVM). The main regulations in connection with a takeover bid for the acquisition of shareholder control of a Brazilian public company are Articles 254-A and 257 of Law No 6,404/1976 (the Brazilian Corporations Act), CVM Ruling No 361 and the regulations of the special corporate governance listing segments of B3, if applicable. The main purpose of the regulations is to provide the potential investor with adequate information about the target company, the offeror and its strategic plans for the target company, and the terms and conditions of the acquisition.

All takeover bids must comply with the following principles:

- The bid shall always be indistinctly addressed to all shareholders of the same type and class of shares subject to the takeover bid.
- The takeover bid shall:
 - ensure equitable treatment to all addressees;
 - provide them with accurate information regarding the offeror and the company subject to the takeover bid; and
 - provide them with the necessary elements to make an instructed and independent decision vis-à-vis their acceptance of the bid.
- The takeover bid shall be intermediated by a brokerage firm, an underwriter or a financial institution with an investment portfolio.
- The takeover bid shall be performed at an auction held on the stock exchange where the target shares are listed. The auction must take place within at least 30 days and at most 45 days after the disclosure of the instrument. The clearance and settlement of the takeover bid shall be made through the stock exchange by the end of the term established in the Notice.
- The CVM may at any time:
 - require the offeror to disclose additional information other than that required by CVM Ruling No 361;
 - suspend an ongoing offer if any irregularity or illegality is verified and this irregularity or illegality can be corrected; and
 - cancel the takeover bid in the case of an irregularity or illegality that cannot be corrected.
- The costs related to the launching and settlement of the takeover bid cannot be paid by the target company.

Takeover bids are divided into:

- mandatory takeover bids due to the sale of shareholder control, which need to be registered with CVM; and
- voluntary takeover bids for the acquisition of shareholder control, which, in general, are not subject to registration with CVM.

Their main characteristics are described in the sections below, together with the main aspects of their regulation in Brazil.

A BRIEF INTRODUCTION TO THE TYPES OF TAKEOVER BIDS

Mandatory takeover bids due to the sale of shareholder control

A takeover bid due to the sale of shareholder control must occur when a party sells, directly or indirectly, a certain number of shares and/or other rights related to shares or securities convertible into shares of a certain public company that assures shareholder control of this company to another party. Pursuant to the Brazilian Corporations Act, the new controlling shareholder shall launch a takeover bid for all the holders of shares with full voting rights, assuring the payment of at least 80 per cent of the price paid to the prior controlling shareholder. The takeover bid is a condition for the effectiveness of the sale of control of the public company.

If the public company is also listed on B3 in a special corporate governance listing segment (Bovespa Mais, Bovespa Mais Nível 2, Novo Mercado or Nível 2), this percentage must be extended to 100 per cent, ensuring the equal treatment of minority shareholders and the prior controlling shareholder. The offeror must also extend the same terms and conditions regarding the payment agreed with the prior controlling shareholder to the minority shareholders. In addition, Nível 2 and Bovespa Mais Nível 2 rules provide that the takeover bid shall be addressed to all minority shareholders, including those that hold shares with restricted voting rights.

The offeror may offer the possibility for the minority shareholders to keep their interest in the company by paying them a premium of an amount at least equal to the difference between:

- the market value of the shares, corresponding to the weighted average price of the shares in the 60 trading days immediately prior to the disclosure of the sale of shareholder control; and
- the price per share paid to the prior controlling shareholder.

The mandatory takeover bid must be registered with CVM and the offeror must file the request within 30 days from the closing of the transaction. The offeror must inform CVM of the terms and conditions of the bid, including:

- the number of targeted securities;
- price to be offered;
- acceptance procedures;
- reasons for the takeover bid; and
- some financial information concerning the target company.

Once the request is filed, the approval process by CVM usually takes between 90 and 120 days, including any request regarding additional information and/or documents.

Voluntary takeover bid for the acquisition of control

The Brazilian Corporations Act provides that the acquisition of control of a public company may be performed through a voluntary takeover bid that shall only be subject to registration and filed with CVM if an exchange of securities is included. Therefore, the implementation of this type of bid can be made as soon as the decision to present the offer is adopted by the offeror.

In a partial voluntary takeover bid for the acquisition of control, the offeror shall grant to the shareholders of the target company the right to condition their acceptance to its success, providing for 'conditional' or 'unconditional' acceptances of the bid. The bid is considered to be successful if the sum of the shares owned by the offeror after its conclusion (determined by the number of unconditional acceptances) grants the shareholder control of the target company, pursuant to the terms of the Notice.

A voluntary takeover bid for the acquisition of control shall be launched at the same price to every shareholder of the same class of securities. Offering a 'fair' price supported by an appraisal report is not mandatory. The offeror may determine the price pursuant to its sole discretion, and it is usually higher than the trading price.

During the period of the voluntary takeover bid for the acquisition of control:

- the offeror and related persons shall disclose to the market: (1) the transactions carried within this period involving the securities issued by the target company (date, amount traded and price per security); (2) the execution of any agreement concerning the acquisition or sale of securities issued by the target company; and (3) the execution of any agreement with the target company, its management members or shareholders that have five per cent or more of the shares of the target company. This obligation is also applicable to the target company, the members of the target company's management and interfering parties from the announcement of their intention to interfere in the offer (see *Competitor offers and interference in the auction* below); and
- any shareholder that, solely or jointly, has 2.5 per cent or more shares of any class of the target company shall disclose to the market: (1) any increase or decrease of its interest of the target company; (2) the execution of any agreement regarding the sale of one per cent or more of any class of shares; and (3) any transaction with derivatives that jointly represents one per cent or more of any class of shares.

CONFIDENTIALITY DUTIES AND ANNOUNCEMENT

The offeror shall keep, and shall instruct its managers, employees and consultants to keep, information regarding the takeover bid confidential until its due announcement to the market. This confidentiality duty is applicable until the disclosure of: (1) a material fact concerning the execution of the share purchase agreement for a mandatory takeover bid; and (2) the Notice of a voluntary takeover bid.

Nonetheless, in the case of any leak of the offeror's intention to launch a takeover bid, the offeror shall immediately inform the market of its intention, regardless of any final decision. This communication must contain, at least, information regarding:

- the number of shares that it intends to acquire;
- information about all the securities issued by the target company and held by the offeror, if any; and
- the existence of any agreements between the offeror and target company.

The offeror must also send this communication to the target company's investor relations officer to provide the disclosure through the company's website. After such communication, CVM might set a deadline for the disclosure by the offeror of either the Notice or its clear decision to not launch a takeover bid within six months.

The official announcement of the takeover bid is the disclosure of the Notice. The Notice is executed by the offeror and underwriter, and shall contain the following information:

- identification of the target company, underwriter and offeror;
- description of the object of the takeover bid, including the number, class and type of shares that will be acquired;
- price per share and payment conditions;
- main terms and conditions of the takeover bid;
- date and time of the auction;
- corporate and financial information about the target company;
- number of securities issued by the target company and held by the offeror, if any;
- existence of agreements between the offeror and the target company;
- representation of the offeror, when it is a controlling shareholder or any related person, that it will pay the holders of outstanding shares who accept the takeover bid the difference, if any, between the price of their shares, as defined pursuant to the Notice and the applicable regulation, and adjusted in the case of changes to the number of shares as a result of a bonus, splits, reverse share split and share conversion, if applicable, and:

- the price per share that would be due, or turns out to be due, if a fact that would impose or might impose on the launching of a mandatory tender offer occurs within one year counted from the auction date; and
- the value they would be entitled to in the case in which they were still shareholders and dissented to the deliberation of the target company approving any corporate event that allows the exercise of withdrawal rights when this event is verified within the term of one year counted from the auction date;
- representation of the offeror and underwriter that they are not aware of any material non-public information that might influence, in a relevant way, the results of the target company or the trading price of the target shares;
- statements by the offeror about the price per share paid in private transactions between independent parties involving the offeror, controlling shareholder or related persons in the last 12 months;
- statements assuring that the obligations of the offeror and intermediary agent to provide true, consistent and sufficient information to the market were duly observed; and
- other information deemed necessary by CVM to guarantee full disclosure to the market.

TAKEOVER BID: STEP-BY-STEP

A takeover bid comprises three main steps:

1. launch;
2. auction; and
3. financial settlement.

However, there are some preparatory steps before the launch date that shall also be explored below.

Preparatory step: engagement of the underwriter and drafting the Notice

Engagement of the intermediary agent

As mentioned before, all bids must be intermediated by a brokerage firm, securities dealership or financial institution with an investment portfolio, which shall be engaged by the offeror. The underwriter is responsible for the financial settlement of the takeover bid and, therefore, the main discussion regarding its engagement concerns the assurance to be provided by the offeror to cover such financial exposure.

The offeror is liable for the accuracy, quality and adequacy of the information provided to CVM and the market. The offeror is also liable for negligence or wilful misconduct in the case of any damage caused to the company, its shareholders and third parties due to inaccuracy, omission or false information.

The underwriter shall take all precautions and act based on high standards of diligence to ensure that the information provided by the offeror is accurate, consistent, true and adequate. In the case of any omission, the underwriter may be held liable. In addition, the underwriters must verify the adequacy and quality of the information provided to the market during the entire takeover bid process.

The underwriter agent also assists the offeror in all steps of the bid and must interrupt its services if the offeror refuses to: (1) perform all necessary acts for the proper development of the bid; or (2) cease the performance of any act that may jeopardise the bid, under the risk of not being exempted from any liability provided for in the regulation.

Finally, the underwriter and the related persons who operate in the financial market are prevented from, as of the engagement as an intermediary agent of the takeover bid: (1) trading securities of the target company, except in the cases provided for in the applicable regulation; and (2) preparing any research and public reports about the company subject to the bid and transaction.

Drafting the Notice

After the engagement of the underwriter, the Notice may be prepared by the parties with the assistance of their respective legal counsels. The Notice of a voluntary takeover bid must be approved by B3 before its disclosure. This analysis usually takes from three business days to 15 business days. The auction date is only set after B3's approval.

The offeror of the voluntary takeover bid may have access to non-public information on the target company when preparing to launch the bid: for example, during the conduction of due diligence procedures. Considering that the offeror must represent that it is not aware of the existence of any material non-public information that might materially impact the results of the target company or the trading price of the target shares, the offeror must request that the target company disclose any material non-public information analysed during the due diligence process (eg, relevant non-disclosed contingencies). Therefore, its access to material non-public information is limited to the information disclosed to the market (usually, this means no access to financial guidance and the financing model).

The Notice for a mandatory takeover bid is submitted for CVM's review and approval, as discussed in the following section.

Filing before CVM

As mentioned above, a mandatory takeover bid due to the sale of control shall be registered with CVM. The first filing of the corresponding documentation shall occur up to 30 days from the closing of the share purchase agreement executed with the previous controlling shareholders.

The following documents must be filed with CVM to request the registration of a mandatory takeover bid:

- request for registration, duly executed by the representatives of the offeror and the underwriter;
- executed copy of the underwriting agreement;
- draft of the Notice;
- description of the marketing material that will be used during the takeover bid;
- applicable corporate acts;
- copy of all agreements related to the sale of shareholder control; and
- proof of payment of CVM's fee.

CVM will analyse the documentation within 30 days and may request additional information or further documents at the end of the period. The parties have 60 days to comply with these requirements.

CVM can issue further requirements. Each round of analysis by the regulator takes another 30 days to be concluded. The total analysis period usually lasts from 90 to 120 days, but, in some cases, due to specific complexities, it can last up to one year.

Launch date

The launch date of the takeover bid is the date the Notice is duly disclosed to the market through the company's and CVM's websites. In a mandatory takeover bid, disclosure shall occur within ten days after CVM's approval. In a voluntary takeover bid, disclosure may occur at any time according to offeror discretion. However, the Notice must be previously approved by B3, as mentioned below. The Notice for a voluntary takeover bid shall also be published in the newspaper used by the target company for its daily publications.

CVM may also request further clarification after the disclosure of the Notice for a voluntary takeover bid; that is, the regulator can – and often does – analyse the documents after launch, even though it is not necessary to register the deal with CVM.

The takeover bid is deemed to be irrevocable after the launch. Nonetheless, it is possible to define some conditions in the Notice that do not depend on the offeror. Once these conditions are met, the offeror has the right to revoke the offer. Additionally, changes to the terms and conditions of the offer might occur:

- in both mandatory and voluntary takeover bids, with no need for prior approval by CVM, if the modification occurs due to the improvement of the offer condition or the resignation of the offeror to any condition disclosed in the Notice;
- in a mandatory bid, in the case of prior approval by CVM; and
- in a voluntary bid, strictly in accordance with the terms disclosed in the Notice.

In the case of any changes, the offeror must amend the Notice and set a new auction date. The new date must be postponed by at least ten days when there is a price increase or 20 days in other cases and, at most, 30 days from the disclosure of the amendment or 45 days from the disclosure of the Notice, whichever is longer.

Auction date

The takeover bid is consummated through an auction on B3, when the acceptance (or rejection) of the proposed terms occurs. The auction date shall be set between 30 and 45 days from the launch date, and the procedures to be followed regarding the acceptance or the bids are defined by B3. After up to four business days, B3 will send the consolidated results of the auction to CVM.

Financial settlement

The financial settlement of the takeover bid usually takes place two business days after the auction date and occurs using the B3 system. A takeover bid can be of three types, according to CVM Ruling No 361, depending on the payment method provided by the offeror:

- purchase, if its payment is made in cash;
- exchange, if its payment is made with other securities; or
- mixed, if its payment is made in a combination of cash and securities.

CVM also provides for alternative offers in which the addressees of the offer may choose the settlement method, whether in cash or with other securities.

Appraisal reports, in general, are not required in takeover bids given that the price of the offer is related to the price paid for the controlling shares in the case of a mandatory takeover bid or determined at the offeror's sole discretion in the case of a voluntary takeover bid. However, if the payment of the offer price is made in securities, an appraisal report of the company whose securities are being exchanged is mandatory and shall be prepared by a specialised firm.

Compared timetables

Event	Mandatory takeover bid	Voluntary takeover bid
Preparation of the corresponding documents	30 days	30 days ¹
File with CVM and CVM analysis period	90 to 120 days	N/A
Launch ²	10 days	At the end of the 30th day
Auction ^{2, 3}	30 to 45 days	30 to 45 days
Financial settlement	2 business days	2 business days
Total	162 to 207 days	62 to 77 days

Notes

- ¹ It usually takes 30 days to have the corresponding documents ready to launch a voluntary takeover bid. However, this term is not mandatory and can be longer or shorter, depending on the complexity of the deal.
- ² Before the launch date and up to ten days prior to the auction date, it is possible to present competitor offers and disclose interference intentions, as further detailed below.
- ³ The instrument of the voluntary takeover bid for the acquisition of control (except if the bid aims to acquire only part of the shares of the target company) must provide that the offeror will have to acquire, during the 30-day period after the auction date, the remaining outstanding shares of the same class and type of the shares acquired in the bid if the holders want to sell them.

COMPETITOR OFFERS AND INTERFERENCE IN THE AUCTION

The intention of any third party to compete in a takeover bid must be previously disclosed to the market, either through the launch of a competitor tender offer (*OPA concorrente*) or through an announcement of an intention to interfere directly in the auction. This disclosure, in both cases, of the filing of the competitor offering (if it is of a mandatory type) must be made at least ten days prior to the date in which the auction will take place.

Competitor tender offer

The competitor tender offer must be launched for a price at least 5 per cent higher than that established in the Notice of the original offer. The competitor tender offer may have a different purpose in comparison with the original offer and target another number or class of shares (eg, if the original offer is a mandatory takeover bid, the competitor offer can be voluntary), and shall observe the same requirements and procedures established for the respective type of offer, including by establishing its provisions in an offer notice.

The competitor tender offer withdraws any manifestations in relation to the acceptance of the takeover bid; in other words, the acceptance of the terms set forth in the Notice by any shareholder of the target company is revoked by the launch of the competitor offer.

Once a competitor offer is launched, both the original offeror and competitor offeror may increase the price of their respective offers as many times as they deem convenient. In such cases, the modification of the conditions of both the original takeover bid and competitor offer shall imply in the amendment their respective instruments, which shall be published disclosing the changes made to the document. These amendments must provide for a new date for their respective auction, which shall be: (1) at least ten days after the publication of the restated instrument in the case of an increase in the offer price; and (2) no more than 30 days after the date of the publication of the restated instrument or 45 days after the date of publication of the original version of the respective instrument.

In the case of a competitive tender offer, CVM might decide to: (1) postpone the original auction date; (2) establish a deadline for the presentation and acceptance of final offers; and/or (3) determine a common auction for both offers, establishing its date, time and rules to be followed.

A remarkable Brazilian case regarding competitor offers was the dispute to acquire Eletropaulo's (the largest Brazilian electric energy distributor) control in 2018. In this case, three competitors launched their respective voluntary takeover bids to acquire control and engaged in several rounds of price increases. After the publication of eight amendments to the instruments, CVM set the date when the offerors had to present their final offers. Their final prices were presented in person by each of the offerors through a sealed envelope handled directly to B3's chief executive officer, and the winner was then defined.

Interference in the auction

As a general rule, procedures shall be adopted during the auction to ensure that it is possible to increase the price to be paid for the shares, and the new price must be extended to all shareholders that have accepted previous bids. However, the increase of a price during the auction is strictly forbidden in voluntary takeover bids when a competitor takeover bid is launched.

In almost every scenario, it is possible to carry buyer interferences during the auction. Note that:

- interferences may target part of or all the shares in the original auction;
- when disclosing their intention to interfere in the auction, the parties who are interested in interfering in the auction shall provide, at least, the following information to the public:
 - identification of the target company, the interfering party and other advisers involved;
 - determination of the number of shares that the interfering party aims to acquire;
 - an indication of any and all securities issued by the target company and held by the interfering party, if applicable; and
 - existence of agreements between the interfering party and target company; and
- in the case that the takeover bid will offer a cash price for the shares, the first buyer interference in the auction shall be at least five per cent higher than the last price offered at the auction.

As of the date of this publication, interferences in tender offer auctions have not yet taken place in the Brazilian market. Therefore, there is no formal procedure or provisions regulating interference in tender offer auctions held at B3. In cases of interference in the auction, B3 is most likely to set forth ad hoc provisions to regulate the event.

In the context of the discussions held during the Eletropaulo case, CVM has determined that the inference procedure is not allowed in voluntary takeover bids, considering that the original offeror cannot increase the price during the auction and, therefore, would be at a huge disadvantage compared with the interfering party.

OTHER BRAZILIAN REGULATION TOPICS

Antitrust aspects

Takeover bids have different regimes before the Brazilian Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica or CADE), depending on their characteristics. In some scenarios, a mandatory takeover bid can only be closed after CADE's prior approval of the transaction regarding the transfer of control.

This *ex ante* approval may be waived, especially in a voluntary takeover bid. In this case, the bid can be launched and settled before any approval by CADE. However, as per CADE's regulations, the offeror will not be allowed to exercise political rights relative to the stake purchased until CADE's approval of the transaction. In addition, if CADE rejects the transaction or makes requests to mitigate the concentration risks, the offeror might be obliged to sell part of the shares acquired during the takeover bid.