

Due Diligence for Private Acquisitions in Brazil

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A Practice Note considering the purpose, scope, and practical aspects of a legal due diligence investigation for the purchase of a private company or business in Brazil. It outlines the process for legal due diligence in Brazil, including organizing the investigation and various sources of information. It also considers issues of confidentiality and data protection during due diligence in Brazil.

Due diligence is the investigation of a person or business. In the context of business acquisitions, the parties use the due diligence process to gather information about each other and about the target business or assets that are for sale. Although the seller occasionally conducts due diligence on the buyer (see [Box, Seller Due Diligence](#)), the due diligence process is usually more significant for the buyer.

Completing a due diligence investigation of a business can be more challenging and complex for a buyer in cross-border transactions. Due diligence practices can vary significantly between countries because of different:

- Legal and regulatory practices.
- Financial reporting systems.
- Business practices, expectations, and customs.

If different jurisdictions are involved, it is important for the buyer to understand the local legal and financial systems, operations, and culture.

This Note considers, from the buyer's perspective, the purpose, scope, and practical aspects of a due diligence investigation for a private share/quota or asset purchase in Brazil. It outlines the process for legal due diligence, including:

- How to organize the due diligence process.
- The various sources of information in a typical due diligence investigation.
- How the information gathered should be reviewed and presented.

It also considers issues of confidentiality and data protection in Brazil.

Unless otherwise stated, a reference in this Note to:

- BCCA means the [Brazilian Clean Company Act](#) (*Lei da Empresa Limpa*) (Law No. 12,846/2013).
- [Brazilian Public Registers Law](#) means Law No. 6,015/1973.
- [Brazilian Tax Code](#) means Law No. 5,172/1966.

- CADE means the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica*), the Brazilian antitrust agency.
- Civil Code means Law No. 10,406/2002, as amended, the [Brazilian Civil Code](#) (*Código Civil Brasileiro*).
- Corporations Law means Law No. 6,404/1976, as amended, the [Brazilian Corporations Law](#) (*Lei das Sociedades por Ações*).
- INPI means the Brazilian Intellectual Property Office (*Instituto Nacional da Propriedade Industrial*).
- LGPD means the [Brazilian General Data Protection Law](#) (*Lei Geral de Proteção de Dados Pessoais*) (Law 13,709/2018)
- Quotas means the units representing the capital of Brazilian limited liability companies (*Sociedade Limitada* (Ltda.)).
- Shares means the units representing the capital of Brazilian corporations (*Sociedade Anônima* (S.A.)).

Purpose of Due Diligence in Brazil

The primary purpose of a due diligence review is to obtain enough information about the target's business to enable the buyer (or other parties with an interest in the transaction, for example, lenders financing the transaction) to decide whether the proposed acquisition represents a sound commercial investment. Due diligence is effectively an audit of the target's affairs: legal, business, operational, tax, accounting, and financial. It is therefore a crucial bargaining tool for the buyer.

Moreover, the results of the due diligence review may identify potential risks that may need to be remedied, mitigated, or simply indemnified by the seller, thus requiring the drafting of specific provisions under the transaction documents. Due diligence results will help determine whether the seller should provide additional or specific representations, warranties, covenants, and indemnification coverage based on potential risks detected, as well as whether the seller should be subject to price retention mechanisms or escrow structures.

Although most due diligence reviews should be completed before a definitive agreement is signed, in practice due diligence may continue after negotiation and execution by the parties of the definitive share or quota purchase agreement and through the closing.

Due diligence results should also help determine the steps necessary following the closing of a potential transaction to remedy the issues detected during the investigation, as well as help the buyer plan its integration of the acquired business.

While due diligence reviews in Brazil are similar to reviews in the UK and US, special attention should be devoted to certain specific areas which are of great concern from a Brazilian legal standpoint, such as:

- Tax (see [Tax Due Diligence](#)).
- Employment (see [Labor and Employment](#)).
- Environmental (see [Environmental Due Diligence](#)).

As a result of corruption scandals in Brazil in recent years, particularly Operation Car Wash (an expansive, multi-year criminal investigation of alleged corruption and money laundering) and its spin-offs, Brazil enacted the BCCA in August 2013. Since the BCCA came into force in January 2014, compliance reviews have also started playing an important part of local due diligence

investigations. Compliance reviews are particularly important if the target business is exposed to interactions with governmental authorities through contracts, licensing, or other types of relationships (see [Compliance Due Diligence](#)).

Since the LGPD came partially into force in August 2020 (and later, in August 2021, in full force), data privacy has been added to the road map of due diligence reviews in Brazil (see [Data Protection Restrictions](#)).

A specific feature of due diligence reviews in Brazil is the analysis of certificates that may be independently obtained in the name of the target company and/or seller before:

- Brazilian courts to check if they are involved in litigation (excepting arbitration panels, which are confidential) (see [Sources of Information about Civil and Tax Litigation](#)).
- Certain public agencies to check if they are in good standing with Brazilian Tax Authorities (Federal, State and Municipal levels) and Labor Authorities (see [Sources of Information about Tax](#) and [Sources of Information about Labor](#)).

It is also possible to carry out searches for information about real properties in Brazil, including ownership, description, constructions, and liens, to the extent that the buyer has the property title number (*matrícula*) (see [Sources of Information about Real Property](#)).

For large or complex transactions in Brazil, the due diligence process can be a lengthy, time consuming and expensive undertaking.

Types of Due Diligence

Legal Due Diligence

In any significant acquisition, a legal due diligence investigation should establish the following key information about the target business:

- Is the target duly incorporated and does it have all operating permits and licenses required by Brazilian law?
- Does the seller have good title to the Shares or Quotas in the target company, and does the target have good title to its assets?
- Does the seller depend on any consent or approval to consummate the transaction?
- Has the target acquired assets or equity interests from third parties, or has it been acquired by the seller? If yes, is there any right to indemnity?
- Did the target dispose of any assets or equity interests to third parties? If yes, is there any obligation to indemnify such third parties?
- Are there any unstated or understated liabilities or risks associated with the target company or assets?
- Could the target or seller's key contracts be affected by the proposed transaction (such as through change of control termination, acceleration rights, anti-assignment clauses, or other transfer restrictions, as applicable)?
- Does the target or seller have related party transactions? Are they duly formalized?

- Is the target company or seller bound by exclusivity and/or non-compete provisions that could result in unintended restrictions for the buyer following the consummation of the transaction?
- What is the total amount of the severance paid to the sales agents in case they are all terminated?
- Does the target or seller require an environmental review based on its industry and activities? Does the target have all required environmental permits and licenses? Are there any contamination issues?
- Are the target's trademarks, patents, industrial designs, license agreements, and other industrial property-related agreements duly registered with the INPI?
- Are the software licenses used by the target duly regularized? Is there any suspected or alleged infringement of a third party's intellectual property?
- Is the target compliant with the LGPD?
- What is the current tax regime of the target? Is it subject to any current or past tax planning?
- Does the target enjoy tax incentives, and can they be transferred?
- Is the target subject to any tax debt amnesty program?
- Does the target correctly classify and employ its workers? More specifically, does the target hire workers through their own companies to skip employee status and avoid payroll taxes and charges?
- What is the target's litigation profile?
- Are there any liens or encumbrances on the target's owned properties? Are any of them classified as rural property?
- How easily can any leased property be terminated?
- Are there any restrictions on the business or transfer of ownership?
- Is the target or seller a competitor?
- Is the declared condition of the property and assets as stated?
- Does the target have interactions with Brazilian governmental authorities?

Detailed information on the target business is required, so that the buyer is in a better position to:

- Confirm the value of the target business or assets.
- Determine the preferred structure of the transaction and contractual protections needed.
- Determine consents or approvals that may be required for the transaction, or any contractual prohibitions on the transfer of key contracts or assets. For example, the consent of industry regulators, competition authorities, shareholders, creditors, or important customers or suppliers of the target.
- Determine conditions precedent that may need to be satisfied by the seller or the target for the consummation of the transaction.
- Plan the integration of the target business.

- Determine whether any ancillary documents are needed (for example, escrow agreement or a transitional services agreement).
- Bargain with the seller.
- Generally, gain as much background information as possible about the target or business to be acquired.

The buyer will inevitably seek contractual protection from the seller in the form of representations, warranties, and indemnities but, in practice, the protection offered may be limited by disclosures and other contractual provisions. While due diligence is not a substitute for contractual protection, it aids the buyer's determination of what contractual protection it requires from the seller and what risks it is not prepared to assume.

Commercial (or Business) Due Diligence

In addition to the legal due diligence review, specialist advisers may be required to contribute commercial (or business) due diligence. Commercial due diligence looks at issues such as:

- The market in which the business operates.
- Competitors.
- The business's strengths and weaknesses.
- Production, sales, and marketing.
- Research and development.

Some of the results of this part of the due diligence review will be relevant to the legal due diligence.

Commercial due diligence aims to test the assumptions already made in the buyer's acquisition plan and to identify management action required by the buyer to take effective control of, and reduce risk in, the business once the deal has closed. It may be particularly relevant for the buyer if the proposed acquisition falls into a completely new area or segment.

Business due diligence reviews are normally carried out by the buyer and its team, although consulting firms may be hired to provide support in specific areas.

Operational Due Diligence

Operational due diligence reviews are aimed at reviewing the core operations of the target and generally assess whether its business plan is consistent, realistic, and addresses downside risks. It provides a detailed examination of the target's management, resources, and performance.

It includes the review of functional and departmental processes, including:

- Manufacturing operations.
- Supply chain and distribution channel.
- Back-office operations such as:
 - finance;

- accounting;
- information technology;
- regulatory compliance; and
- human resources.

The review allows the buyer to have a better understanding and knowledge of the target, including its investment requirements, ability to support future growth, and material gaps that may require remediation. It is an effective tool for the new controller and its management to implement mechanisms that may help the target improve its operations by taking advantage of existing synergies and opportunities, minimizing risks, and maximizing cash flow efficiency throughout the investment lifecycle.

Operational due diligence reviews are also normally carried out by the buyer and its team, although consulting firms may be hired to provide support in specific areas.

Accounting/Financial Due Diligence

As part of the due diligence process, the buyer may instruct accountants or financial advisors to prepare a report on the financial aspects of the target business, including a review of the target's financial statements. As a rule, accounting/financial due diligence reviews in Brazil are carried out by an accounting firm (either a local branch of an international accounting firm or a local firm).

Accounting/financial due diligence is not the equivalent of a financial audit, and an audit opinion with respect to the financial accounts or internal controls of the target as normally provided in the context of a financial audit will not be issued. Accounting/financial due diligence focuses on the areas of the target's financial affairs that are material to the buyer's decision to proceed with the transaction. This includes the accounting analysis as to whether the target's accounting statements (balance sheets, cash flow statements, income statements) are in balance with its equity, economic and financial situation.

From the financial perspective, the review checks the application of resources and the control of the target's cash flow. In general, the financial due diligence also determines if the target complies with the tax laws vis-à-vis its financial situation and may detect undue payments and absence of internal controls of the target's financial department.

The buyer can then assess the accounting/financial risks and opportunities of the deal and whether, given these risks and opportunities, the target business will fit well into the buyer's strategy. Financial due diligence may also help quantify:

- Potential synergies.
- The best acquisition and financing structure.
- The impact of the acquisition on the buyer's performance metrics. When the buyer's accounting policies are more conservative than those followed in the target business, it may be necessary to make appropriate adjustments to measure the true impact.
- The impact of the acquisition on the buyer's compliance programs.

Tax Due Diligence

Tax will always be an area of great concern to a buyer in Brazil, no matter the size of the transaction or the industry in which the target operates.

Brazil is known for having one of the most complex tax systems in the world. There are three levels of tax authorities in Brazil, resulting in taxes collected by:

- The Federal Government.
- States (Brazil has 26 states and 1 Federal District).
- Municipalities (Brazil has 5,570 municipalities).

In addition, the Brazilian tax system is composed of several accessory obligations, which makes it highly complex and generates high costs for companies to manage them.

Tax disputes are, therefore, commonplace in Brazil.

Tax due diligence is usually carried out by accountants as well as by tax advisers and tax lawyers. The main difference between the scope of the reviews by accountants and tax advisers and tax lawyers is that:

- Accountants will check if the target company is properly accounting for and paying taxes (including labor taxes and payroll charges).
- Tax advisers and tax lawyers will investigate if there are outstanding taxes (disputed or not) as well potential tax liabilities which could materialize after the sale is consummated.

The tax accounting review is usually included in the scope of the accounting firm that oversees the accounting/financial due diligence (either a local branch of an international accounting firm or a local firm).

On the legal side, the investigation will analyze the likelihood of the target's success in any existing tax disputes. The existence of tax debts amnesty programs between the target and tax authorities should also be confirmed and reviewed.

In particular, the legal tax due diligence may include a review of:

- Consultations made to any tax authorities and their respective answers in the past five years.
- Documents concerning any tax litigation proceedings, including litigation reports and memorandums.
- Agreements related to amnesty or deferral of tax and/or social security debts, with the respective proof of payment and description of listed assets, if any.
- The target's tax book named "Register of Use of Documents and Terms of Occurrence" (*Livro de Registro de Utilização de Documentos e Termos de Ocorrência*).
- Details of the target's financial account (*Razão*) "provision for contingencies" and risk assessment criteria.
- Procedures adopted by the target that could result in tax exposure for the past five years but has not been detected by the tax authorities or reported in the balance sheet.
- Legal and accounting tax opinions received by the target in the past five years.

- Tax planning implemented in the past five years.
- Ongoing inspections by local tax authorities, including the Terms of Commencement and Closing Tax Audit and Summons Term for Document Presentation, for example.
- Benefits and tax incentives granted to the target, as well as their legal basis and copies of the respective granting acts.
- Use of tax credits, indicating:
 - form of credit, such as an offset against other taxes, recovery of unduly paid debt, or use of extemporaneous credits;
 - the involved amounts already used and to be used; and
 - existence or not of judicial measures allowing the use of credits.

In a stock transaction, the buyer will be normally concerned with any outstanding tax obligations of the target. In Brazil, the purchase of assets may also attract the target's liabilities, particularly tax, labor, and civil liabilities, if such assets form an operating enterprise or an establishment, as such term is defined by Brazilian laws.

More specifically, Article 133 of the Brazilian Tax Code provides that the company that acquires, for any purpose, a commercial, manufacturing, or professional establishment, or goodwill, and continues the respective commercial operation, under the same or another corporate name, will be liable for the taxes assessed on the acquired establishment either:

- In full, if the seller completely ceases to carry out any kind of commercial, manufacturing, or professional activity.
- On a subsidiary basis with the seller, if the seller continues to carry out the business or starts, within six months from the date of the sale, a new activity in the same or another business segment.

Although the Brazilian Tax Code limits the liability of the buyer to the tax debts related to the acquired establishment or goodwill, in practice the extension of such liability will be defined according to the greater or lesser relevance of the transferred establishment or goodwill vis-à-vis the seller's entire business. The Brazilian Tax Code further provides that the assignment or lien on assets owned by a taxpayer is deemed a tax fraud when the taxpayer has tax debts regularly listed for collection by the Brazilian tax authorities, except if the taxpayer has sufficient assets to guarantee the full payment of such debts.

Labor and Employment

Another area of great concern in Brazil is labor and employment. Employment laws in Brazil are generally protective of employees, which over the years has caused the filing of a considerable number of labor claims before Brazilian Courts.

Notwithstanding, ever since the Brazilian Labor Reform came into force in November 2017, the number of labor disputes has reduced over the years. Still, labor disputes are commonplace and require a review of the likelihood of success for the target.

Labor due diligence is usually carried out by accountants as well as by labor lawyers. While accountants will be mostly focused on the review of proper accounting and payment of labor rights (including taxes and payroll charges), lawyers will review the labor records, particularly the registration of employees and compliance with other employee obligations arising from the law and collective agreements, as well as labor claims.

Because employment costs in Brazil are very high (an employee in Brazil costs an extra 73.33% on top of base compensation), many companies tend to hire workers who form their own companies (*Pessoas Jurídicas*) to provide services to the employer.

These workers may be deemed employees statutorily and may represent a substantial contingent liability for the target. Substance over form will prevail in the determination of whether an employment relationship exists or not.

In particular, the labor and employment due diligence may include a review of:

- Target employees and information about:
 - their position, age, category, period of employment, annual remuneration, payroll journal with all the information related to payments and discounts made, and admission date;
 - employees working in continuous rotational shifts;
 - employees who adopt the Government Severance Indemnity Fund for employees (*Fundo de Garantia por Tempo de Serviço*, or FGTS), if applicable;
 - whether or not the target has salary and promotional policies, and career plan; and
 - the compensation for sales, including plans of payment of commissions.
- Standard employment agreement used by the target.
- Probation contracts entered in the last two years.
- Employees terminated in the last two years, together with copies of the required termination agreements (*Termo de Rescisão de Contrato de Trabalho* (TRCTs)) and proof of severance payments.
- Service agreements entered with self-employed workers, cooperatives, and companies (outsourcing and temporary labor), together with copies of the respective agreements in force for the last two years.
- Employees with job stabilities, including employees in the position of union leaders, members of the target's Internal Commission for Accident Prevention (*Comissão Interna de Prevenção de Acidentes*, or CIPA), indicating, in each case, the stability period and the salary, as well as a list of employees on leave for any reason.
- Agreements and/or reports involving job security and occupational health (PPRA - Environmental Risks Prevention Program, PCMSO - Occupational Health Control Program and Technical Report of Environmental Working Conditions), as well as information about the existence of unhealthy or risky areas of work.
- Collective bargaining agreements.
- Documents concerning any labor claims, including litigation reports and memorandums.
- Benefits granted to the employees of any nature, whether mandatory or granted by convenience, including profit sharing plan (PLR), retirement, bonus, or stock options.
- Work shifts adopted by the target, with respective intervals and any relay scales.
- Overtime compensation and work shifts extension agreements.
- Work shifts systems used to monitor external and internal employees.
- Authorization from the Ministry of Labor to work on rest days and holidays.

In Brazil, the purchase of assets may attract the target's labor liabilities, if such assets form an operating enterprise or an establishment, as such term is defined by Brazilian laws.

More specifically, employment succession is characterized when the ownership of one or more establishments of the employer is transferred to another entity or when employees continue to perform the same activities at the same location after the transfer of assets and liabilities from the original employer to another entity.

Labor authorities may also find parties to a Brazilian joint venture as being part of the same economic group and, consequently, determine that they are jointly and severally liable for each other's labor debts, which may require a due diligence review of each joint venture partner.

For more information on key employment law issues to consider when acquiring a company or business in Brazil, see [Practice Note, Employees: Cross-Border Private Acquisitions \(Brazil\)](#).

Environmental Due Diligence

The acquisition of a company that is a manufacturing or processing company, or whose assets include land used or previously used for industrial processes, will raise the need for environmental due diligence.

From a legal perspective, the environmental due diligence should check whether the target has all permits and licenses and that its activities are conducted in compliance with the applicable environmental laws. As a rule, the change of control of the target should not affect its environmental licenses.

Contamination of soil, water or air in Brazil is subject to administrative, civil, and criminal sanctions. Environmental damage is one of the few cases in the Brazilian legal frame providing for criminal liability of the legal entity.

Various Brazilian environmental laws impose strict, joint and several liability on anyone who has caused, facilitated, or contributed to the occurrence of environmental damage. If a contaminated property is being acquired in the context of a stock transaction or asset deal, the buyer will be assuming responsibility for remedying the environmental damages, even if it has not caused it directly. Significantly, according to a decision issued by the Brazilian Supreme Court in April 2020, claims for collective environmental damages are no longer barred by the statutes of limitations.

Some laws and regulations expressly impose the obligation on the party having legal responsibility for the property to immediately communicate to the State Environmental Agency and the competent health agency as soon as a soil or groundwater contamination is suspected and to carry out the related confirmatory investigation.

Whenever a contamination is detected in Brazil, the following procedures are required to be carried out:

- A preliminary assessment.
- A confirmatory investigation.
- A detailed investigation.
- A risk assessment.
- The implementation of intervention actions.
- Monitoring activities (through conclusion).

The process of renewal of the target's existing licenses along the process may be impacted if remediation is not implemented according to the requirements of the authorities.

One of the most challenging aspects in the early stage of the process is the determination of the clean-up costs, if (at all) possible. The acquisition agreement will have to determine and allocate responsibility for clean-up and to obtain protection where appropriate from the seller.

For these reasons, although there are contractual mechanisms to protect the buyer's interests as the new owner, the environmental investigation is a must.

In particular, the legal environmental due diligence may include a review of:

- Environmental licenses (Preliminary, Installation and Operation Licenses) issued by the environmental authorities, including state and/or municipal authorities which have an environmental body duly incorporated. Information and documents concerning the fulfillment of the conditions, requirements, and instructions set forth in the licenses and environmental permits, as well as the documents regarding environmental exemption from environmental license should be requested.
- Use of chemicals in the target's activities, such as solvents, resins, varnishes, even if in small quantities. If case such products are used, the respective licenses and/or authorizations (such as an Operation License issued by the Federal Police and/or the Civil Police) should be requested and reviewed.
- Documents issued by municipal authorities which evidence the compatibility of the facilities with municipal laws regarding the use of the land and occupation.
- Environmental authorizations specific to installations in protected areas (such as areas certified as historic structures, conservation areas, or permanent preservation areas, for example, banks of rivers or lakes, tops of hills, and environments of springs).
- Inspection Notice (if pending requirements for the regularization of facilities are identified) and/or Notice of Environmental Infraction (including application of penalties, work embargo, suspension of operation, warning, or other terms) due to absence of license or to operation in disagreement with the issued license.
- System of collection and separation of effluents.
- Granting of the use of water or any other documents authorizing and certifying the regularity of water use (if collected from rivers, lakes, or wells) and the disposal of liquid effluents (whether industrial or domestic).
- Commitment agreements (administrative and/or judicial), such as by Terms of Conduct Adjustment commitments (TAC) with the Public Prosecutor Office, NGOs, or environmental agencies.
- Registration of Potentially Polluting Activities with the Brazilian Institute of Environment and Renewable Natural Resources (*Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis* (IBAMA)) (or with the register according to [State Law 14,601/2008](#), in case the integration with IBAMA has not occurred yet) and payment of the Environmental Inspection and Control fee (TCFA).

Compliance Due Diligence

Compliance due diligence reviews have become a key area in virtually all acquisitions since the enactment of the BCCA in 2013. Although the BCCA addresses public corruption, in recent years local companies have become generally concerned about the adoption of good corporate governance practices and implementation of integrity and compliance programs.

Notwithstanding, local compliance due diligence reviews still have more relevance to a buyer when the target is exposed to interactions with government authorities in the performance of its activities, whether through contracts, licensing, or otherwise.

To better understand the scope of a compliance due diligence in Brazil, it is important to highlight the main features of the BCCA, which is generally in line with foreign legislation such as the US [Foreign Corrupt Practices Act of 1977 \(FCPA\)](#) and the UK [Bribery Act 2010](#).

The purpose of the BCCA is to make companies and legal entities liable for violations committed in their name. They may be held liable for the following conduct that can be performed by their representatives, including third parties acting "in their interest":

- Bribery and corruption.
- Fraud in relation to agreements entered with the public administration.
- Prevention or impairment of investigations regarding any of the conduct above by public authorities.

The provisions of the BCCA may also apply to acts performed abroad against foreign public officials by any entity having its headquarters, an agency, or a branch in Brazil.

Violators of the BCCA are subject to administrative, civil, and criminal sanctions (although criminal liabilities in this case apply only to individuals, not to companies). The liability of the legal entity is strict and exists regardless of the existence of fault.

Companies belonging to the same economic group, consortium members or joint-venture partners are held jointly and severally liable for violations of the BCCA, although joint liability is limited to the payment of fines and indemnification of damages arising out of such violation. Officers and shareholders with powers over management may also be held liable for penalties imposed on the legal entity, to the extent they have acted with fault.

Fines are quite heavy and may range from 0.1% to 20% of the gross turnover of the company in the latest fiscal year prior to the start of the administrative proceeding (excluding taxes on turnover). If it is not possible to calculate the benefit obtained, fines may range from BRL6,000 to BRL60 million.

The existence of effective compliance programs with procedures on integrity, audit, and whistleblowing incentives by the legal entity might be considered as an extenuating factor in the fine calculation.

Administrative liability of the legal entity will not prevent the possibility of the legal entity being held liable in court. The Federal Government, States, the Federal District, Municipalities, and the Attorney's Office may file lawsuits to impose the following penalties on legal entities:

- Confiscation of assets, rights or values obtained from the advantage or profit directly or indirectly achieved out of the violation, with due regard for the right of the injured party or of the good-faith third party.
- The suspension or partial shutdown of the legal entity's activities.
- The compulsory dissolution of the legal entity.
- The prohibition against receiving incentives, subsidies, grants, donations or loans from governmental agencies or entities and from public financial institutions or publicly controlled institutions, for a period of one to five years.

For more information on anti-bribery and corruption laws in Brazil, see [Practice Note, Anti-Corruption: Private Acquisitions and Joint Ventures \(Brazil\)](#).

In particular, the legal compliance due diligence may include a review of:

- Risk assessment on the target's anti-bribery and compliance matters.
- The target's policies for reimbursement of expenses to employees and service providers.
- Transactions involving the target that require payments (in cash or by wire transfer) without an invoice.
- Practices related to authorizations and registry of benefits granted or provided to public or private third parties (for example, gifts, sponsorships, or trips).
- Agreements entered with the Public Administration.
- Interactions with the Public Administration beyond agreements (such as licensing, tax incentives, or cooperation agreements).
- Family relationships or relevant bonds between any of the target's partners, officers, directors, or employees acting in its name and members of the Public Administration.
- Donations made by the target, its individual partners, officers or directors to any candidates or political parties in the past five years.
- The target's internal compliance structure.
- Documents comprising the target's integrity and compliance program, including codes of conduct, compliance policies, and internal policies.
- Internal investigations conducted by the target in the last five years in relation to violations of laws or regulations (whether confirmed, known, suspicious or potential violations).
- Records related to the dismissal of any employee due to fraud, corruption, or any other inappropriate conduct.
- Communication or complaint channels related to the clarification of doubts of compliance or complaints, as well as copies of related internal reports.
- Self-disclosures made by the target to the Public Administration (for example, leniency agreements, TACs, or deeds of commitments).
- Investigations initiated or ongoing against the target in the past five years.

Scope of Due Diligence Review

Many factors influence the scope of the due diligence investigation. It is important to determine the scope at the outset because it dictates how many people are needed, how much time is required, whether outside experts are engaged and depth of review. Common factors that influence the scope of a due diligence review include:

- **Deal Structure.** For example, if the transaction is a stock acquisition or merger, the buyer will likely need information on the entire business. In an asset acquisition, the buyer may only focus on the specific assets and liabilities it is acquiring. However, the purchase of assets in Brazil may bring with it the target's liabilities, particularly tax, labor, and civil liabilities, if such assets form an operating enterprise or an establishment, as that term is defined by Brazilian laws.

Strictly from a successor liability standpoint, there may not be a significant difference between a stock transaction and an asset transaction in Brazil, although there are alternatives to mitigate successor liability in the context of an asset deal.

- **Industry.** The industry of the target business may influence areas of due diligence on which the buyer will concentrate (see [Due Diligence for Industry Risk](#)).
- **Global presence.** If the target business has global operations, it is important to assess compliance with applicable trade controls and bribery and corruption laws, including the BCCA, which is generally in line with foreign legislation such as the FCPA and the UK Bribery Act. Accordingly, provisions of the BCCA may apply in connection with acts performed abroad against foreign public officials by any entity having its headquarters, an agency, or a branch in Brazil.
- **Competition.** If the buyer and seller compete, they may want (or be required by competition (antitrust) laws) to keep certain information (such as, pricing) confidential until after the transaction is completed (see [Disclosure of Sensitive Information](#)).
- **Purpose.** For example, if two companies are looking for a trade advantage or element of synergy through a merger, the investigation will focus on matters such as economies of scale, marketing advantages, and competition issues. However, Brazilian labor authorities may find parties to a Brazilian joint venture as being part of the same economic group and, consequently, determine that they are jointly and severally liable for each other's labor debts, which may require a due diligence review of each joint venture partner (see [Labor and Employment](#)).
- **Risk tolerance.** The buyer may be willing to purchase a target business or assets without engaging in much due diligence if the price is right. The buyer's legal advisers should engage in a thorough discussion with the buyer about its risk tolerance level and advise their client about potential risks involved in the transaction.

The extent of the investigation is also likely to be governed by practical realities, such as:

- **Access to seller and target business.** The seller often restricts access to itself or the managers of the target business to limit interference and protect its proprietary information.
- **Expense.** The buyer may limit the scope of the due diligence investigation to reduce its expenses. Sometimes, a buyer conducts its investigation in stages and only increases spending when the likelihood of the deal closing increases.
- **Time constraints.** The parties may wish to complete the transaction by a certain date (such as fiscal year end) or the seller may have enough bargaining power to limit the time allowed for due diligence (for example, in an [auction](#)).

Even if the investigation is well-focused, there will need to be a limit on the information to be supplied. For example, a due diligence request to review all current contracts of the target business could turn up many small contracts entered in the ordinary course of business that will have little bearing on the price or risks of the transaction. One solution would be to ask only for details of all contracts entered outside the ordinary course of business and to put a monetary floor on the value of contracts entered in the ordinary course of business which are to be disclosed.

Although contractual protection is no substitute for a thorough due diligence exercise, it may offer some comfort where, for example, time is short and due diligence is limited. In these circumstances, the buyer should at least seek to investigate key issues and take other steps to protect itself. For example:

- Ensure that warranties and indemnities are sufficiently wide and specific.
- Negotiate indemnities for the applicable statute of limitations periods, as set forth in applicable Brazilian laws.

- Consider negotiating a retention of the purchase price to cover potential tax, labor, and/or warranty claims, as applicable.
- Propose a price adjustment.

Depending on the nature of the target's business, the buyer may also want to instruct experts such as environmental experts, IT or HR consultants, or other relevant specialists.

Due Diligence for Industry Risk

The buyer will also need to identify the main areas of risk and liability inherent in the industry in which the target operates. This sets the emphasis of the legal due diligence exercise and enables the buyer to seek appropriate contractual protections from the seller. The buyer should consider the following issues:

- What are the "normal" risks in this industry?
- What is the known reputation of the target company and how has it been run?
- What is the assessment of those who are selling the business and, if different, those who have been running it?
- Does the buyer have the personnel to run the business if the management team it acquires are not up to task?

If a buyer operates in the same industry as the seller and is purchasing the target business or assets for growth or consolidation purposes, the buyer may not engage in much operational due diligence or require a thorough legal review of certain standard contracts.

If personnel are important, enquiries will need to focus on employment conditions and motivation. If the industry sector is heavily regulated, such as financial services or pharmaceuticals, questions about compliance with applicable regulations need to be satisfactorily answered in advance. If the post-acquisition performance depends on a few critical contracts, it will be very important to ascertain the attitude of the other parties to those contracts to the acquisition before it takes place.

Organizing the Due Diligence Process

Discuss Scope of Due Diligence with Buyer

It may be helpful for the legal adviser to meet with the buyer at an early stage to agree the parameters of the investigation. At this meeting, the adviser should find out how much their client already knows about the target business and ask the buyer to highlight any areas of concern.

Before beginning the due diligence review, the buyer's lawyers should establish with their client:

- A due diligence budget.
- The scope of review (see [Scope of Due Diligence Review](#)).
- What type of oral or written report is required (see [Due Diligence Report](#)).
- The deadline for completing the due diligence review and delivering the report.

- Whether any outside consultants should be engaged.
- If certain areas should be of primary focus.
- If there are any threshold issues that could make or break the deal (known as deal breakers).
- The process for communicating with the seller and the management of the target business. For example, the buyer's lawyers may be required to communicate through a third party such as an investment banker.

The extent of the due diligence investigation should be in keeping with the value and importance of the acquisition to the buyer and the potential risk. It is important to agree the scope of the legal due diligence investigation at the outset and for the buyer to understand the limits of that scope.

The Due Diligence Team

It is essential that the acquisition team is made up of appropriate people under clear leadership and with good reporting structures. The team carrying out the due diligence must involve the buyer's own personnel as well as its legal and financial advisers and accountants. In some cases, it may also be necessary to retain outside consultants in other areas such as regulatory compliance, environmental, or insurance. Because the due diligence team can be large and comprised of multiple organizations, it is important to have a point person to organize and coordinate the process. The point person may be the buyer, but often the buyer delegates this responsibility to its lawyers.

Generally, the legal team consists of corporate lawyers and other specialists (such as tax, labor, environmental, compliance, real estate, litigation, and intellectual property lawyers). Lawyers doing the due diligence investigation must be fully briefed as to the purpose of the acquisition, the depth of investigation required and the key areas of importance for the client. If this information is not given, the onus is on the lawyers carrying out due diligence to ask the relevant questions rather than proceed with an unfocused investigation.

Due Diligence Checklist and Questionnaire

One of the most important preliminary activities in the context of a due diligence exercise is to prepare the due diligence checklist, which is a list of the documents and information to be requested to the seller and to the target company that should be uploaded in the data room. To prepare the due diligence checklist, the buyer's advisers should read the main publicly available information on the target company (see [Other Sources of Information](#)).

In drafting the due diligence checklist, the adviser should consider the scope of the due diligence exercise that has been agreed with the client (see [Scope of Due Diligence Review](#)). Special attention should be devoted to certain specific areas of concern from a Brazilian legal standpoint, such as tax, labor, and environmental (if the transaction involves the acquisition of a manufacturing or processing company, or a company whose assets include land used or previously used for industrial processes). Compliance may also be a key area in Brazil if the target is in any way exposed to interactions with governmental authorities.

The cornerstone of any due diligence exercise is the questionnaire or information request that sets out the areas of investigation and a list of questions and enquiries to be put to the seller. The due diligence questionnaire should be well organized and easy to update. Ideally, the questionnaire should not be too technical; each section should be stand-alone so that it can be considered by the appropriate adviser.

These questions will usually be supplemented by further requests as the negotiations proceed and as the buyer learns more about the target. Care should always be taken to tailor standard due diligence questions so that they are relevant to the target company and the relevant transaction. Due diligence checklists in Brazil should include the request for court certificates as well as tax clearance certificates in the name of the target company and, where appropriate, the seller.

Data Room

The bulk of due diligence review involves reading documents of the target business, including corporate records, contracts, certificates, and litigation reports. A seller usually sets up a data room, in which relevant information on the target will be made available to the buyer and its diligence team in a physical location. Sometimes, especially in smaller transactions, the seller may either send the buyer electronic or hard copies of documents.

Nowadays the data room is often virtual (internet-based and password protected) rather than a physical data room at the seller's offices or the office of the seller's attorney. If the materials are stored on an online data site, the seller determines who is invited to the data site and gives password-protected access. It is important to determine which due diligence team members need access to the data site so that the buyer's lawyers can submit a comprehensive request for access to the seller.

In either case (physical or virtual), access to the data room materials will be limited to the designated representatives of the buyer who are, directly or indirectly, subject to confidentiality restrictions of the confidentiality agreement.

Vendor Due Diligence Reports

Although most acquisitions in Brazil involve one buyer and one seller, auction processes may take place, particularly if the target is a big company. These processes are not locally regulated and follow international standards.

It is common in auction sales for the seller to conduct a formal seller due diligence process culminating in the preparation of one or more vendor due diligence reports (also referred to as VDD reports or VDDR) by the seller's advisers to be provided to prospective buyers.

The types of VDD report commissioned by a seller vary from transaction to transaction. Financial VDD reports are common. Other VDD reports may cover legal, tax, commercial and property matters.

VDD reports are initially given to prospective buyers on a non-reliance basis, but on the understanding that the reports will be addressed to the successful bidder who can then rely on them in the same way that they rely on the bidder's own due diligence reports, subject to the report provider's terms of business.

The main purpose of providing VDD reports is to accelerate the bidders' due diligence on the target company. While they require considerable management input before the sale process begins, once it is underway, management tends to spend less time answering due diligence questions from bidders.

Other Sources of Information

Information about a target company can be derived from a variety of sources, including the web site of the seller or the target business. The amount of publicly available information in Brazil has expanded rapidly, particularly with the growth of the internet.

Sources of Corporate and Financial Information

Key corporate information can be obtained from:

- **Boards of Trade (*Juntas Comerciais*).** Boards of trade are part of the indirect public administration in Brazil and under the jurisdiction of each Brazilian State (Brazil has 26 States and 1 Federal District). The search must, therefore,

be made in the State where the target's head offices are located. For details of the information available at the Boards of Trade, see [Company Searches](#).

- **Brazilian Federal Revenue Department.** It is possible to obtain information such as a name, address, list of partners and/or managers on the [REDESIM portal](#) of the Brazilian Federal Revenue Department, provided that you have the target's company registration number with the Corporate Taxpayer Register of the Ministry of Economy (*Cadastro Nacional da Pessoa Jurídica* (CNPJ/ME)). The Brazilian Federal Revenue Department regulations require the disclosure of ultimate beneficial owners in some cases, but presently there is no ultimate beneficial owner register in Brazil.
- **State Tax Registration.** It is possible to find out if a company has a state tax registration, which is the license required for a company to carry out local trading activities in Brazil, by accessing the [SINTEGRA](#) site.
- **Import and Export License.** It is possible to find out if a company is duly licensed to carry out import and export transactions in Brazil by accessing the Brazilian Federal Revenue Department [consultation portal](#) (provided you have the target company's CNPJ).
- **Financial Information.** While the partners/shareholders of Brazilian companies are statutorily required to deliberate on the management accounts and financial statements of the company within the four months following the end of each financial year, only Brazilian corporations (*Sociedades Anônimas*) are required to publish and file their financial statements, which may be an advantage to Brazilian limited liability companies (*Sociedades Limitadas*) in terms of cost savings and confidentiality. Notwithstanding, as of April 2015, limited liability companies incorporated in the State of São Paulo and falling into the definition of a "large company" are also under the obligation to publish their financial statements. A large company is defined as a company or group of companies under the same control which have had, in the previous fiscal year:
 - total assets exceeding BRL240 million; or
 - annual gross revenues exceeding BRL300 million.

Sources of Information about Real Property

Since the enactment of the Brazilian Public Registers Law in 1973, Brazil has been operating a public registration system for real properties. Whenever you apply for the registration of a real estate transaction with the competent Real Estate Register Office (*Cartório de Registro de Imóveis*), the register issues a title number (*matrícula*) to the real property. Based on that number, anyone may access all information related to the property that has been submitted for registration, such as:

- Details of the owner.
- Description of the real property.
- Mortgages.
- Court seizures.
- Other third-party rights to the property subject to registration.

Sources of Information about Intellectual Property (IP)

The INPI is the competent governmental authority for the granting of patents, trademarks, and industrial design registrations. Registration before INPI is mandatory for the protection of patents, trademarks, and industrial design. Software is deemed a copyrightable subject matter, equivalent to a literary work, and its registration with the INPI is optional. Other copyrights may, but are not required to, be registered with the Brazilian National Library.

Searches for patents can be conducted through the [INPI portal](#) (user registration required).

The search criteria can be:

- the applicant's name or its registration number with the CNPJ/ME (or if the applicant is an individual, the registration number with the Individual Taxpayer Register of the Ministry of Economy (*Cadastro de Pessoas Físicas* (CPF/ME)); or
- the number of the patent application or respective bank slip number.

The outcome of the searches does not include applications that are still within the secrecy period, which is for 18 months as of the respective filing date for inventions and utilities, and 180 days for industrial designs.

Searches for trademarks can be conducted through the [INPI portal](#) (user registration required).

The search criteria can be:

- the trademark name;
- the applicant's name or its registration number with the CNPJ/ME or CPF/ME;
- the [NICE classification](#) codes (for marks that consist of, or contain, figurative elements);
- the Vienna classification codes (only for marks that consist of, or contain, figurative elements); or
- the number of the trademark application.

Searches for copyrights can be conducted through:

- Regarding software: the [INPI portal](#) (user registration required).
- Regarding other copyrights: the [EDA Collection portal](#).

The search criteria for software are the numbers of the software applications. The search criteria for copyrights can be:

- the work's title (*obra*);
- the work's registration number; or
- the author's name or its registration number with the CNPJ/ME or CPF/ME.

Searches for design rights can be conducted through the [INPI portal](#) (user registration required).

The search criteria can be:

- the design's title;
- the applicant's name or its registration number with the CNPJ/ME or CPF/ME; or
- the number of the design application.

Sources of Information about Certain Moveable Assets

Public information on ownership on certain moveable assets can be obtained as follows:

- **Airplanes.** Consultation with the [Brazilian Aeronautical Registry \(RAB\)](#).
- **Cars.** Consultation with the Department of Traffic (DETRAN) of each State (see the [DETRAN of the State of São Paulo](#)).
- **Boats.** Consultation with the Brazilian Merchant Marine (except those boats:
 - used by the Navy; or
 - exempted for not having propulsion or exceeding ten meters of length).

Sources of Information about Tax

It is possible to obtain the following tax certificates on the website of Brazilian tax authorities to check if the target and/or the seller are in good standing:

- **Federal tax debts.** [Federal tax clearance certificates](#) issued by the Federal Revenue Office and the National Treasury Prosecution Office.
- **State tax debts.** Certificate of tax debts owed to the State Treasury (it is necessary to access the website of the relevant Brazilian State; for example, a [clearance certificate of tax debts for the State of São Paulo](#)).
- **Municipal tax debts.** Certificate of tax debts owed to the Municipality (it is necessary to access the website of the relevant Municipality; for example, a [clearance certificate of tax debts for the City of São Paulo](#)).

The target's CNPJ/ME is typically required.

It is also possible to search tax administrative proceedings in the name of the target and/or seller on the websites of Brazilian tax authorities (federal and state).

For sources of information about tax litigation, see [Sources of Information about Civil and Tax Litigation](#).

Sources of Information about Labor

It is possible to obtain the employer compliance certificate on the [Employer Regularity Consultation portal](#) of the Brazilian Federal Savings Bank (CAIXA) (provided you have the target company's CNPJ) to check if the target and/or the seller are regularly making the monthly deposits to the FGTS.

It is also possible to search labor claims and debts in the name of the target and/or seller before the Brazilian labor judicial and administrative courts, as follows:

- Certificate of Assignment of Labor Claims issued by the [Regional Labor Court of the 2nd Region](#) (includes São Paulo City and the great metropolitan area).
- Labor Debt Clearance Certificate issued by the [Superior Labor Court](#).
- Clearance Certificate of Inquiries issued by the [Labor Prosecutor's Office of São Paulo of the 2nd Region](#) (includes São Paulo City and the great metropolitan area) (provided you have the target company's CNPJ).

Sources of Information about Civil and Tax Litigation

It is also possible to search civil and tax litigation in the name of the target and/or seller before the Brazilian civil federal and state courts, as follows:

- Certificate of existing reorganization or bankruptcy proceedings issued by the State Courts (it is necessary to access the website of the relevant Brazilian State; for example, the [service portal](#) of the State of São Paulo Courts).
- Certificate of existing civil proceedings including tax foreclosures issued by the State Courts (ten years) (it is necessary to access the website of the relevant Brazilian State; for example, the [service portal](#) of the State of São Paulo Courts).
- Certificate of existing civil proceedings issued by the State Courts (it is necessary to access the website of the relevant Brazilian State; for example, the [service portal](#) of the State of São Paulo Courts).
- Certificates of federal proceedings issued by the Federal Courts of the 3rd Region, which includes the States of São Paulo and Mato Grosso do Sul (ten years), through its [certificate request portal](#).
- Certificate of existing civil and criminal proceedings issued by the Federal Courts of Appeals of the 3rd Region, which includes the States of São Paulo and Mato Grosso do Sul (ten years), through its [certificate request portal](#).

Contact with Target's Management

An important aspect of due diligence can be to establish contact with the target's management and to discuss the business with them. The buyer will often ask to visit the target business site and talk with members of management. The buyer's lawyers may also have follow-up questions after reading due diligence materials which can be answered more completely during a phone call.

However, due to confidentiality concerns, the target business or seller may not want its employees to be aware of the transaction, so it may only grant access to a few members of management of the target business or seller (in an asset sale) during the due diligence process. This can be a hotly negotiated matter.

Confidentiality and Data Protection

Virtually all serious discussions and negotiations between a prospective buyer and seller begin with the execution of a confidentiality agreement as a precondition to the buyer obtaining access to the information it will require to decide whether and how to formulate a proposal to purchase the target.

Except in those situations where the proposed transaction involves the formation of a joint venture or where the prospective buyer is proposing to pay consideration other than cash, most confidentiality agreements are unilateral, meaning that they provide access to confidential information to, and restrictions on, the use of that information by the prospective buyer only.

The confidentiality agreement will provide the prospective buyer, and its advisers and representatives, with access to the seller's confidential information for the limited purpose of evaluating whether to engage in a transaction with the seller. The information provided cannot be used for any other purpose and must be returned or destroyed in the event the buyer elects not to go forward with a transaction.

The seller might also ask for a provision restricting the ability of the prospective buyer to hire away its employees in the event the prospective buyer elects not to go forward with the transaction. Other commonly negotiated provisions include:

- The extent to which confidential information can be shared by the prospective buyer with its outside advisors and representatives (including debt and equity financing sources).
- Disclaimers with respect to the accuracy or completeness of the information provided.
- Provisions with respect to sensitive information.
- Term of the confidentiality period.
- Termination of the agreement.

For more information on confidentiality agreements and other preliminary deal agreements in Brazil, see [Practice Note, Key Documents for Acquiring a Private Company \(Brazil\)](#).

If the buyer is a competitor or potential competitor, a seller may be particularly reluctant to disclose sensitive information about the target business until it can be sure that the sale will go through.

The knowledge that a business is for sale can also be unsettling for employees, customers, and suppliers. It can lead to a loss of customers or key staff during the sale process. In some cases, the seller will wish to keep its intention to sell the target confidential from all but the most senior management. This will limit the scope of the information available for a full due diligence investigation.

The seller will want to ensure that no approaches are made to its customers, suppliers, management, or employees either with a view to poaching them or obtaining more information. In an auction sale, it is more difficult to maintain confidentiality because of the number of parties involved. Bridging the gap in expectations between the seller, who is concerned to restrict the release of information, and the buyer, who wants to gather as much information as possible, is a crucial element of the initial stages of any transaction.

Disclosure of Sensitive Information

There are legal restrictions in Brazil on the disclosure of commercially or competitively sensitive information which the seller will have to be careful to respect when providing information to the buyer in the context of a due diligence investigation. The seller should avoid sharing competitively sensitive information with the buyer until a binding agreement is executed between the parties.

Transactions subject to a mandatory competition filing under the Brazilian Competition Law may only be closed and consummated after receiving the respective clearance from CADE. Until the clearance is granted, the parties to the transaction are required to remain independent from each other.

Article 88, §3 of the Brazilian Competition Law prohibits the practice known as [gun jumping](#). Prohibited business transactions or conduct prior to clearance from CADE may include the exchange of competitively sensitive information between the parties, such as pricing, customers, employee wages, marketing strategies, and main suppliers.

There are ways to mitigate risks concerning the sharing of competitively sensitive information during the due diligence review process, such as by the aggregation or anonymization of the data to be shared, or the creation of clean teams and parlor rooms.

Data Protection Restrictions

The LGPD affects virtually all participants to an M&A transaction in Brazil in the performance of due diligence reviews, as well as in structuring deals and negotiating transaction documents.

It is expected that the target company will be processing personal data subject to the LGPD and that the seller, as data controller, will have established procedures to ensure that the transaction does not violate the LGPD. In the process of determining the list of documents and information to be made available to the buyer and its due diligence team, the seller may be required to exclude personal data from such documents and information if it does not bring value to the transaction.

For the personal data to be disclosed, the legal basis for processing the data must be defined to avoid breaches of the LGPD by the seller or any third party that may have access to it. Special attention should be devoted to international transfers of data if the target business has global operations, and it is expected that personal data will be made available in multiple jurisdictions.

All participants to the transaction, including the buyer and its deal team, should check if the seller has implemented procedures for lawful transfer of personal data in the context of the transaction, particularly for the due diligence process, since they could also be deemed data controllers and, consequently, subject to the provisions of the LGPD.

Failure of the target to implement effective data protection governance during the due diligence review can give rise to civil liability and administrative sanctions.

One alternative is to negotiate specific representations from the seller regarding compliance with the LGPD in any preliminary agreement, such as the confidentiality agreement.

Data protection due diligence may include a review of:

- Structure for managing personal data, including if the target has a data mapping strategy and determined the legal basis for processing each category of personal data.
- Personal data breach incidents.
- Existence of a data protection officer.
- Existence of data protection provisions in the target's agreements.

Reviewing Information: What to Look For

Following the due diligence investigation, the first step in the review is to consider the completeness of the responses to the enquiries and whether all documents requested have been supplied and all questions satisfactorily answered (see [Due Diligence Checklist and Questionnaire](#))

A review of the target's contracts may raise various issues for consideration. Are there any contractual covenants that could be triggered by the transaction, such as a change of control clause? Any provision in the target's organizational documents imposing limitations on anyone obtaining more than a specified percentage of the voting rights might also act as an obstacle to assuming control of a business. Anti-trust or other regulatory issues may require the buyer to dispose of various brands owned by itself or the target before the acquisition can proceed.

The sections below are a guide to assessing corporate information, material agreements, licenses, and litigation disclosed as part of the due diligence investigation. It does not provide an exhaustive list, as each transaction may bring its own particularities.

Corporate Information

Company Searches

A company search at the Board of Trade of the State where the target's head offices are located can reveal a wealth of information about a target company, such as:

- In the case of Brazilian limited liability companies:
 - articles of association and any amendments;
 - minutes of meetings or resolution of partners; and
 - minutes of meetings or resolutions of the company's officers or the fiscal council (if in operation).

- In the case of Brazilian corporations:
 - by-laws;
 - minutes of annual and extraordinary shareholders meetings;
 - minutes of meetings of the board of directors (if applicable) and board of officers; and
 - minutes of meetings of the fiscal council (if in operation).

The search can be carried out in person or online on the web site of the Board of Trade of the relevant Brazilian State; for example, see the [company research portal](#) for the State of São Paulo.

Which companies to search depends on the nature of the transaction. On most share purchases, the buyer or its advisers should search against:

- The target and its subsidiaries.
- Any companies in which it has a significant shareholding.

- The corporate seller.
- The corporate guarantor (if applicable).

On an asset purchase, where there is no separate target company to search, a search against a corporate seller may be helpful.

The information available at the Board of Trade will not necessarily be up to date. In Brazil, a corporate document will be legally effective retroactively to its signature date, provided it is submitted for registration with the Board of Trade within 30 days. Corporate documents filed after this 30-day period will be enforceable against third parties as of the date on which they are registered.

However, the company is only generally required to file resolutions aimed at producing legal effects on third parties. It is therefore advisable to request the seller to provide copies of all corporate documents of the target, filed or not. The buyer typically also requires a seller to warrant under the purchase agreement that all the information provided is complete, correct, and up to date.

Corporate Information Provided by the Seller

In addition to information obtained through a Board of Trade search, the buyer normally requests the following information or copies of the following documents from the seller in its due diligence questionnaire:

- Corporate structure chart of the target and its controlled and related companies, and for all other companies in which the target holds an interest (including consortiums and joint ventures), identifying shareholders/partners to the level of natural persons, and showing the percentage interest held by each.
- List of all the target's establishments and branches (*filiais*), including:
 - type (head office, office, industrial unit, distribution center, warehouse, sales point, or other type);
 - complete address;
 - Business Registration Number (*Número de Inscrição no Registro de Empresas*); and
 - activities conducted.
- List of all foreign countries in which the target is licensed (or should be licensed) to do business, in which the target owns or leases land or other assets, or in which employees of the target reside.
- Proof of:
 - publication of corporate documents in the Official Gazette (*Diário Oficial*) and in the newspaper chosen by the target; and
 - filing of corporate documents with the Board of Trade (*Junta Comercial*) and/or other government authorities, as applicable.
- Copies of the target's corporate books.
- Identification of any pledge, collateral or encumbrances over the Quotas or Shares (including usufruct) which is registered in the corporate books, or which is of knowledge of the target by any other way.

- All agreements related to commitments or purchase and sale of assets, corporate documents, protocols, agreements, and related documents concerning any corporate reorganization (merger, spin-off and/or incorporation, transfer of assets and liabilities to the other company, capital reduction, conversions) related to the target and its controller and that has been held in the last five years, or in relation to those the target still has any contractual liability for, by succession or otherwise, and also related to ongoing corporate reorganizations.

Material Agreements

Every business has agreements that are material to the success of its operation. These might include:

- Agreements with customers.
- Supply, purchase, or service agreements with key suppliers and service providers.
- Sales representation, agency, and distribution agreements.
- Research and development agreements.
- Cost sharing agreements.
- Intellectual property licenses (for example, patent or trademark licenses).
- Leases for important equipment (for example, computers).
- Real property leases for facilities.
- Capital leases, contracts for the deferred purchase of property, and sale-leaseback arrangements.
- Joint venture, partnership, and marketing agreements.
- Agreements with governmental authorities.
- Loan and other debt agreements to provide capital to run the business.
- All noncompete, exclusivity, and confidentiality agreements.

Other agreements, such as agreements to dispose of assets, businesses, or shares may subject the company to continuing liability with respect to a business sold previously.

Likewise, when the target has acquired a company or business, it is necessary to investigate whether it is still under any obligation to indemnify the former owner for any contingencies related to the acquired company or business, whether reflected in the target's financial statements or not.

The due diligence enquiries need to identify those agreements that are material to the target's business. That is, those that will affect the price the buyer is willing to pay for the target or which pose material business or liability risks. The due diligence questionnaire will typically indicate the criteria by which a contract is considered material, for example, by value.

Having identified the material agreements of the business, the reviewer should check that the contracts are effective, that they been executed properly and that they do not contravene any legal requirements.

Consultation with foreign counsel may also be needed if the target's agreements are governed by laws of other jurisdictions.

The principal commercial terms of these agreements should be noted. The following questions are relevant to almost all enquiries:

- **Parties.** Are the parties to the agreement the persons to whom the agreement relates? For example, in a license of intellectual property, is the company using the intellectual property the company named in the agreement or is the named party the parent or associated company of the user? Is the grantor of the license the legal and beneficial owner of the intellectual property?
- **Execution of the agreement.** Has the agreement been properly executed? Did the person signing the agreement have the proper authority?
- **Effectiveness of agreement.** Is the agreement too vague to be enforceable?
- **Assignment clause.** Is the consent of a third party needed for the transfer of the benefit of the contract?
- **Change of control clause.** Does the agreement stipulate that the consent of the other contracting party must be given on a sale of Shares or Quotas of the target?
- **Confidentiality.** Is the target already in breach of this clause in an agreement, possibly giving a right to damages against the target should it be acquired?
- **Warranties, guarantees, indemnities.** Warranties in most commercial contracts either relate to compliance with applicable laws and regulations or compliance with the quality standards and the specifications of the contract. Additionally, there are certain standard indemnities relating to breach of third-party rights, breach of contract, and liability for damages. The extent of these warranties and indemnities should be noted.
- **Term and termination.** What is the date of commencement of the agreement? Is the agreement subject to conditions precedent, for example, a regulatory approval? When does the agreement terminate? Will a major supply contract, for example, terminate soon? What are the termination events? Will any compensation or penalty be payable on termination of an agreement? Can the agreement be terminated on notice? What actions entitle the other party (or the target) to terminate for breach?
- **Liability and exclusion clauses.** Is the liability of the other party or the target limited in respect of breach of the agreement? Is there an exclusion of liability in respect of the target's obligations or the other party's? If so, is it likely to be enforceable?
- **Intra-group.** Are all intra-group contracts to which the target is party made at arms' length? Do any such contracts give rise to any contingent tax liabilities?

The significance of issues raised by a review of the target's legal documents will often depend on whether the proposed transaction is a share sale or an asset sale. For example, a change of control clause may be of no significance on an asset sale whereas it might be crucial on a share sale. On an asset sale, the assignment clause will be critical.

Inevitably, material agreements will raise their own specific issues in addition to the above. The buyer's intentions also have a bearing on the review of material agreements. For example, if a loan to the target is to be repaid on completion, the provisions of the loan agreement relating to prepayment and redemption are critical. If it is to be left outstanding, the buyer will want to be sure that the terms are appropriate when applied to it as the new borrower.

Licenses and Authorizations

Depending on the business performed by the target company, it may be obliged to hold certain licenses and permits issued by the public authorities.

The due diligence review should identify that all necessary licenses are in place, are duly held by the target company and are still in force. The necessary licenses and authorizations will depend on the nature of the business. For example, a company dedicated to sales activities must hold a license issued by the State Tax Authorities where each of its businesses are located.

A share sale transaction would normally not impact the status of the licenses and authorizations since the entity holding the given license or authorization (that is, the target company) does not change. However, in an asset sale transaction, the transfer of the license or authorization may imply either a notice to the given public entity or even the need to request prior authorization, depending on the license or authorization.

Litigation and Outstanding Claims

Litigation is commonplace in Brazil. Most local businesses experience litigation, particularly of labor, tax, and consumer claims, from time to time. Common due diligence requests include:

- All documentation regarding any judicial or arbitral litigation, sanctions, administrative proceedings, or governmental investigations or inquiries (past, pending, or threatened), affecting the target or any subsidiary, as well as all material fines or penalties to which the target is or may become subject to in connection with such proceedings, investigations, or inquiries.
- For each proceeding, investigation or inquiry, a summary of the nature, parties, the court, the case number, the subject of litigation, the value of the matter in controversy, the estimated value involved in the dispute (together with the criteria adopted for the calculation of this estimate and information on any provisions made to the financial statements of the target in order to face payment of such amount), information on the existence of any guaranty of the value involved (such as a court deposit, bond or pledged assets, together with evidence that such guaranties were rendered and remain under willingness of the court where such proceedings are being held), the prognosis by counsel handling the case of the possible end to the litigation, as well as its legal and procedure characteristics, on a case by case basis, observing the following criteria:
 - probable loss: significant chance that the claim will not be judged affirmatively to the target;
 - possible loss: litigation whose result presently cannot be foreseen; and
 - remote loss: significant chances that the litigation will be judged affirmatively to the target.
- Correspondence, memoranda, or notes concerning:
 - disputes with suppliers, competitors, or customers regarding any claim which may have a material impact on the target, or seeking injunctive or other equitable relief;
 - licensing or use of technology;
 - violations of governmental contracts;
 - inventions disputed by current or former employees, consultants, partner, shareholder, director or officer of the target or any affiliate;
 - inquiries from tax authorities (Federal, State, or Municipal);

- inquiries from environmental authorities;
- inquiries from labor authorities;
- inquiries from antitrust authorities; and
- inquiries from any governmental authority or agency related to a potential violation of any law, rule, or regulation.

Communicating Results of Due Diligence

During the Due Diligence Investigation

Part of the key to a successful due diligence investigation is communicating the results to those responsible for assessing the proposed transaction and making the decisions.

The due diligence review is usually carried out in parallel to the negotiation of the acquisition and the drafting of the acquisition agreement. Any significant information that might affect negotiations or the drafting should be communicated immediately to a senior lawyer or the client even though the due diligence exercise is not complete. All members of the team must be alerted to potential deal-breakers so that they understand what information is important and must be shared as soon as it is discovered.

Important information that comes to light during due diligence must be communicated to the buyer and to members of the buyer's management. Any problematic issues which come to light should then be raised at a full board meeting so that they can be properly considered by those responsible for approving the deal.

Due Diligence Summaries

It is important when reviewing due diligence to keep careful notes of the findings. Often the buyer's lawyers create a written record summarizing the key terms and conditions of each document.

Due Diligence Report

Once the investigation is complete, the information will be consolidated in a due diligence report, which should cover the business, financial, legal, and other specialist areas of the investigation. For certain transactions, this may be an informal report focusing only on matters material to the transaction. For others, it will comprise a complete audit of the target's business including an in-depth summary of the target's material contracts.

While the report will often be addressed to executive management, it should be in a form that can be circulated to the board in advance of the meeting at which definitive approval of the acquisition will be considered.

Time must be allowed to review the report, follow up on further questions and evaluate fully the implications of what is revealed.

Third-Party Reliance on the Due Diligence Reports

Sometimes (such as when the buyer finances the acquisition) the buyer is asked to share the due diligence report with a third party (such as the financing bank or members of the buying syndicate). Some firms permit the client to share the report, provided that the third party executes a non-reliance letter.

Lawyers should find out from their client whether it plans to share the report with any third parties and whether any third parties expect to rely on the reports. They should then consult with the deal team to determine the appropriate course of action.

If the client shares the report, lawyers should remind their client that the third party may review the report with a different objective and that the information in the report may reveal sensitivities about the target company that the buyer may want to keep confidential. In addition, the report may contain information that may be sensitive from a competition perspective and, prior to a potential disclosure to third parties, certain pieces of such information should be excluded.

Seller Due Diligence

Although this Practice Note is focused on the buyer, a prospective seller may wish to conduct its own due diligence of the target business or assets before and during the transaction to help it identify risks, deficiencies, and liabilities, enabling it to mitigate them before conducting the transaction.

A seller should also conduct due diligence on the buyer. This will help the seller assess if the buyer can afford the target business or assets and obtain information about the buyer that the seller may leverage when negotiating the purchase agreement.

Furthermore, if the buyer is issuing stock to the seller as consideration or if the transaction is a merger of equals, the seller needs to conduct a thorough due diligence investigation of the buyer.

If the buyer is issuing stock, the seller should:

- Confirm that the buyer has authority to issue the stock.
- Confirm the value of the buyer's stock.
- Identify any impediments to the issuance.

In a merger of equals, each party needs to:

- Confirm the value of the transaction.
- Identify steps necessary to integrate the companies.
- Learn more about the other's business.
- Identify any impediments to the transaction.

Due Diligence Considerations for Private Equity Buyers

A private equity buyer may have a different view on certain due diligence issues. Private equity buyers are often more risk-averse because they are trying to make a relatively quick profit on a highly leveraged acquisition. Generally, a buyer who is currently operating in the industry (known as a strategic buyer) is better equipped to absorb an operational loss or messy litigation. As a result, private equity buyers often conduct more extensive due diligence reviews than other types of buyers and may seek greater contractual protections.

As opposed to a strategic buyer, a private equity buyer may not have certain operational capabilities. For example, if a private equity buyer buys a target business that does not have its own payroll department or IT systems, the private equity buyer will have to procure those services. A strategic buyer would likely have those services already in place for its existing business. As a result, a private equity buyer may need to focus on operational due diligence.

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