

## Medicinal product regulation and product liability in Brazil: overview

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### REGULATORY OVERVIEW

#### 1. What are the main legislation and regulatory authorities for pharmaceuticals in your jurisdiction?

##### Legislation

The Brazilian regulatory framework regarding pharmaceuticals is in a constant state of change. The current national regulatory framework for medicines, drugs, pharmaceutical active ingredients and medical devices is extensive and complex compared to ten years ago. The two constitutional clauses that established the foundation for the framework are:

- **Article 196, Federal Constitution 1988 (FC 1988).** This provides for Brazilian health policies and the regulatory framework for medical devices, pharmaceutical products and pharmaceutical active ingredients aimed at reducing the risk of illness and other hazards for the whole population.
- **Article 197, FC 1988.** This enshrines the government's duty to regulate the provision of health services and products, whether directly or through third parties.

The key legislation is:

- **Federal Law No. 6,360 of 23 September 1976, as amended by Law No. 13,097 of 19 January 2015.** The main law related to pharmaceutical products in Brazil. It regulates, among other things, the production, commercialisation, advertising, labelling, inspection, quality control, penalties, importation and marketing approvals of medicines, drugs, pharmaceutical active ingredients, medical devices, cosmetics, sanitisers and other products. This law is regulated by Decree No. 79,094 of 5 January 1977, amended by Decree No. 8,077 of 2013.
- **Law No. 5,991 of 17 December 1973, amended by Law No. 13,097 of 19 January 2015.** Regulates sanitary control related to the trade of drugs, medicines, pharmaceutical active ingredients and medical devices.
- **Law No. 9,787 of 10 February 1999.** Provides that generic medicines can obtain marketing authorisation provided they are proved to be interchangeable (through bioavailability and bioequivalence studies) with the reference medicine.
- **Law No. 6,437 of 20 August 1977.** Sets out the penalties for infringing sanitary federal law, including criminal sanctions.
- **Law No. 9,294 of 1996.** Imposes restrictions on the use of, and advertising for, smoking products, alcoholic beverages, medicine, therapies and agricultural pesticides. This law is regulated by Decree No. 2,018 of 1996.

##### Regulatory authorities

The National Sanitary Surveillance Agency (ANVISA) ([www.anvisa.gov.br](http://www.anvisa.gov.br)) was established by Law No. 9,782 of 26

January 1999 (Law No. 9,782/99). It is linked to the Ministry of Health, despite operating as a financially autonomous regulatory agency.

ANVISA's statutory role is to protect public health by regulating the production and marketing authorisation of pharmaceuticals, food, sanitisers, cosmetics, medical devices, smoking products and so on. ANVISA also regulates:

- Factories where these products are produced.
- Processes used.
- Raw materials and the technologies related to the final product.

ANVISA's main responsibilities are set out in Law No. 9,782/99, amended by Law No. 13,097/15. A marketing authorisation from ANVISA is required to produce and commercialise pharmaceutical products in Brazil, or import pharmaceutical products into Brazil. Every company seeking a pharmaceutical marketing authorisation must have good manufacturing practices (GMP), following the standards required by ANVISA.

Among other activities, ANVISA is responsible for the sanitary control of the production and marketing of products and services subject to sanitary surveillance, including related premises, processes, pharmaceutical active ingredients and technologies, as well as:

- Controlling ports, airports and borders and co-ordinating the National System of Sanitary Surveillance.
- Establishing rules, proposing, monitoring and executing policies and activities concerning health surveillance.
- Authorising the operations of companies manufacturing, distributing and importing medicines.
- Approving the import and export of medicines, granting marketing approval for medicines and granting and cancelling GMP certificates.
- Closing down, as a sanitary surveillance measure, manufacturing plants and any premises involved in the management, importation, storage, distribution and sale of health-related products and services, if the relevant legislation is violated, or if they constitute a likely health risk.
- Analysing patent applications related to pharmaceutical products and processes, jointly with INPI (prior consent analysis).

#### 2. Briefly outline how biologicals and combination products are regulated in your jurisdiction.

In 2010, ANVISA updated the regulations for biological products, and different regulatory pathways for new biological products and for copies were established (*Resolution No. 55 of 16 December*

2010). For new biological products, the usual pathway, based on a full dossier submitted by the applicant, is required. For similar biological products, the following two regulatory pathways were introduced:

- **Individual development pathway.** A reduced dossier can be submitted. The applicant must submit full data regarding quality issues but this does not have to be comparative. The number of non-clinical and clinical studies submitted can be reduced, depending on how much data is available on the pharmacological properties, safety and efficacy of the originator product. At least one comparative Phase III study (equivalence, superiority or non-inferiority) with the originator biological product is mandatory (except for hemoderivatives, vaccines and biological products for oncological use). When available, the results of phase IV studies should be submitted.
- **Comparative pathway.** A comparator product must be submitted. The applicant must use comparability in terms of quality, safety and efficacy between the comparator biological product and the biological product.

Two other recent pieces of legislation are also relevant:

- Resolution No. 49 of 20 September 2011, amended by Resolution No. 24 of 14 May 2013. This provides for post-registration changes and inclusions, suspensions and reactivations of manufacture and cancellation of registration of biological products.
- Resolution No. 50 of 20 September 2011 amended by Resolution No. 25 of 14 May 2013. This provides for procedures and conditions for conducting stability studies for registration or post-registration changes of biological products.

### 3. Briefly outline how medical devices and diagnostics are regulated in your jurisdiction. Is there any specific regulation of health IT issues and mobile medical applications?

Medical devices and diagnostics, except diagnostic reactants for *in vitro* use, are regulated by Resolution No. 185 of 22 October 2001. Each medical/diagnostic device is assigned to one of four regulatory classes (Class I, II, III or IV) based on the risk the device poses to the patient and/or user. Class I includes devices with the lowest risk and Class IV includes those with the greatest risk.

Certain devices, particularly electro medical ones, require certification following INMETRO (National Institute of Metrology, Quality and Technology)'s standards. These are set out in Normative Instruction No. 9 of 26 December 2013.

## PRICING, STATE FUNDING AND REIMBURSEMENT

### 4. What is the structure of the national healthcare system, and how is it funded?

Although the Constitution establishes that health is everyone's right, the Brazilian national healthcare system is in practice not comprehensive and assists mostly poor citizens. Most middle-class Brazilians rely on private medical insurance, which is often subsidised by employers (including all branches of government). Law No. 9,656 of 3 June 1998 establishes the rules for private insurances and healthcare plans.

The regional healthcare network is a unified system, organised according to the following principles (*Article 198 FC 1988, Law No. 8,080 19 September 1990 and Law No. 8,142 of 28 December 1990*):

- Decentralisation, with a single management in each sphere of government.

- Full service, with priority given to preventive activities.
- Participation of the community.

This Unified Healthcare System (SUS) is statutorily defined as comprising "health activities and services, provided by public and federal entities and institutions, both by states and counties, of the direct and indirect administration of the foundations maintained by the government".

Maintained by the federal, state and county executive governments from taxes and contributions, SUS relies on publicly owned facilities, such as hospitals, hiring private contractors for specific needs.

The health activities and services provided by SUS are organised regionally and hierarchically. SUS has a unified management structure, exercised by each government sphere of the following institutions:

- In relation to the Federal Union, by the Ministry of Health.
- In relation to the states, Federal District and municipalities, by the respective health offices.

### 5. How are the prices of medicinal products regulated?

The prices of new medicinal products and new presentations of medicines are strictly regulated in Brazil. Prices are set by the Pharmaceutical Market Regulation Council (CMED), after the marketing authorisation is issued by ANVISA.

CMED was created by Law No. 10,742 of 6 October 2003, and is composed of members of the Ministries of Health, Justice and Finance and the Chief of Staff to the President. CMED is responsible for monitoring and regulating the pharmaceutical market and establishing parameters and criteria for setting and adjusting the prices of medicines in Brazil, to stimulate competition in the market. Prices are reviewed annually in March.

The new norm Resolution No. 1, of 23 February 2015 sets out the criteria of coefficient adjustments for medicine prices. To commercialise a product, after marketing authorisation by ANVISA, a company must file the following economic data (*Article 16, VII, Law No. 6,360/76, as amended by Law No. 10,742/03*), which must be taken into consideration by CMED when setting or adjusting prices:

- The price charged by the company in foreign countries.
- The cost of the active ingredients.
- The cost per patient of the treatment with the product.
- The potential number of patients to be treated with the product.
- The price that the company intends to charge in the market, including tax.
- The commercialisation plan, including advertising and sales costs.
- The list of all the competitor products with their respective prices.
- Information on intellectual property, especially patents covering the product.

However, some products are not subject to the analysis of CMED, such as herbal, homeopathic, and medicines subject to simplified notification at ANVISA.

## 6. When is the cost of a medicinal product funded by the state or reimbursed? How is the pharmacist compensated for his dispensing services?

There is no direct or indirect reimbursement to end-users or pharmacists in Brazil. Medicines in Brazil have the same tax burden as other non-essential goods, such as alcoholic beverages or clothes.

However, Article 6, clause D of Law No. 8,080 of 19 September 1990 establishes that SUS has an obligation to provide integral therapeutic assistance, that includes pharmaceuticals. The Brazilian population therefore has the right to receive free medicines.

Federal, state and county authorities have a free distribution programme of medicines in public hospitals (including anti-inflammatory drugs, analgesics, oral contraceptives, antihypertensive drugs, and so on). The National Medicines Policy of the Ministry of Health, established by Ordinance No. 3,916 of 30 October 1998, must adopt "Rename" (the National List of Essential Medicines), which serves as a guideline for state and municipal governments to create their own lists in accordance with each region's needs. The current list is provided by Ordinance No. 533 of 28 March 2012.

There are several programmes for patients with chronic diseases (for example, diabetes, asthma, epilepsy and Alzheimer's disease). There is also an HIV/AIDS programme, responsible for the free distribution of antiretroviral medicines, which is recognised as the leading programme worldwide.

The federal government buys nearly 50% of the medicines in Brazil. The distribution is made by the federal, state and county public hospitals.

The purchase of medicines by the Ministry of Health and public health institutions is carried out through competitive bidding in a procurement process under the FC 1988 (*Federal Law No. 8,666/93, as amended*). The supplier with the lowest price, who proves that the medicine meets the legal and technical requirements of the procurement, wins the bid. Federal Law No. 9,787/99 states that a public bid for the purchase of medicines must include the international non-proprietary name (INN).

A system called low-cost pharmacy was also introduced under Decree No. 5,090/04. It is currently regulated by Ordinance No. 971/12, as amended by Ordinance No. 1,146/12. Under this system, the federal government buys medicines from the industry and distributes or sells them to patients at a lower cost, through a network of pharmacies.

## CLINICAL TRIALS

### 7. Outline the regulation of clinical trials.

The interest in clinical trials has increased sharply in Brazil in the last ten years. The country's medical facilities have received investment from international sources and have benefited from foreign know-how and transfer of technology.

#### Legislation and regulatory authorities

Clinical trials are regulated by the National Health Council, linked to the Ministry of Health, through Resolution No. 466/2012, which sets out the main guidelines for clinical research, particularly concerning the ethical aspects of research involving humans.

Through Resolution No. 9 of 20 February 2015, ANVISA ruled on the technical requirements for clinical trials with medicines. This resolution was approved after having been submitted to a Public Consultation in 2014. Different participants from Brazilian society

provided a total of 641 contributions which included the Brazilian clinical sector. Through this Resolution Brazilian standards are brought up to meet those established by international guidelines and should encourage the development of clinical trials in Brazil, besides promoting Brazilian participation in clinical trials carried out simultaneously in different countries.

#### Authorisations

Every clinical trial to be performed with medicinal and health products in Brazil, regardless of its subject (whether new medicines or new or therapeutic indications, for example), must be submitted to ANVISA's prior evaluation by means of a clinical development dossier. ANVISA's Co-ordination of Research and Clinical Trials (COPEC) analyses all the required documentation, as well as the sanitary risks involved, before granting the approval.

Among other issues of relevance, Resolution No. 9/2015 defines a deadline by which ANVISA must conclude the analysis of the submitted dossiers regarding the projects on clinical trials to be conducted in Brazil. According to the Resolution, Phase III studies involving synthetic drugs conducted in other countries which are part of the submitted dossiers, should have their reviews concluded by ANVISA at the most in 90 days.

As to Phase I and Phase II studies with biologicals, or those performed only in Brazil, ANVISA must conclude their evaluation in no more than 180 days. Studies however cannot be initiated before complete evaluation on behalf of ANVISA.

The trial's sponsor or the person in charge of conducting the trials is responsible for preparing the dossier to be submitted to COPEC's evaluation, fulfilling all the requirements set out in Resolution No. 9/2015.

In addition, as a condition of obtaining ANVISA's approval, the company must file a detailed protocol before the Ethics Committee (CEP) of the institution in which the clinical trial will be performed, to have all ethical aspects of the trial analysed. Every CEP must be registered at the National Ethics Commission (CONEP), linked to the Ministry of Health and the Health National Council. This protocol must contain the freely given and informed consent of the trial subjects (or their legal representatives) on every detail of the clinical trial, such as objectives, procedures to be adopted, alternative methods to be eventually adopted, risks, assistance offered to the subject, freedom to withdraw from the trial, and so on (*see below, Consent*).

#### Consent

The consent set out in Resolution No. 466/2012 covers new international documents such as the Universal Declaration on the Human Genome, the International Declaration on Human Genetic Data and the Universal Declaration on Bioethics and Human Rights. However, it no longer refers to the Declaration of Helsinki in its latest version of 2008, referring only to versions up to the year 2000. It must contain the following information:

- Rationale aims and methods to be used in the research.
- Any foreseeable risks or discomfort to the subject, as well as benefits that might reasonably be expected, associated with participation in the research.
- Existing alternative methods.
- Medical follow-up and care to be provided to the subjects of research, as well as the identity of those responsible for these actions.
- Assurance of information concerning the methodology, before and during the research, including the possibility of inclusion in a control or placebo group.
- Freedom of the individual to refuse participation or withdraw his consent, at any time during the research, without any penalty or loss of benefits to which he would otherwise be entitled.

- Extent to which confidentiality of records will be maintained, to safeguard the privacy of the research subjects.
- Forms of reimbursement of current expenditure resulting from participation in the research.
- Types of indemnity to cover possible injury resulting from the research.

#### Trial pre-conditions

Insurance coverage is not required, but the sponsor must declare himself responsible for assistance in the case of complications or damage caused during the trial, including adverse reactions.

#### Procedural requirements

The sponsor must file annual reports about the trial, as well as a final report with the conclusion of the trial, along with a special report concerning adverse reactions.

## MANUFACTURING

### 8. What is the authorisation process for manufacturing medicinal products?

#### Application

The company must obtain an operating authorisation from the Ministry of Health. Once this authorisation is granted, the company must obtain a licence from the local sanitary surveillance body (state, county or municipalities), which ultimately allows the company to start its manufacturing activities. State and country rules must also be observed. Further, the company must obtain a GMP (Good Manufacture Practices) certificate from ANVISA, after ANVISA inspects the manufacturer's plant.

#### Conditions

To obtain an operating authorisation and licence, the company must (*Articles 2, 50, 51 and 52, Law No. 6,360/76, amended by Law 13.097/15*):

- Specify its industrial activities and the kind of products it wishes to manufacture.
- Prove its technical, scientific and operational capability.
- Satisfy other requirements set out in ANVISA's internal rules.

The company must also obtain approval from the state sanitary surveillance body for the building's projects and plants. County rules must also be observed.

#### Restrictions on foreign applicants

Foreign manufacturers can market medicinal products in Brazil as imported goods, through local subsidiaries or local commercial representatives. To do so, they must obtain a GMP certificate from ANVISA, after ANVISA inspects the manufacturer's premises abroad. The local subsidiaries or local commercial representatives must obtain an operating authorisation and licence, as well as marketing authorisation for each imported product. The specific regulation on imported medicinal products is ANVISA's Resolution No. 81 of 5 November 2008, as amended by Resolution No. 28, of 28 June 2011.

#### Key stages and timing

It takes roughly between six months to one year to:

- File the operating authorisation request at the Ministry of Health (ANVISA).
- Obtain Ministry of Health approval.
- File the operating licence at the local sanitary surveillance body.
- Obtain the licence.

- Publish it in the *Official Gazette*.

#### Fee

ANVISA charges fees for granting the operating authorisation, for each type of activity performed by the company (*Annex II, Law No. 9,782/99, amended by Law 13.043/14*). These fees also vary depending on the size of the company, under Resolution No. 222 of 28 December 2006, which is available on ANVISA's website.

#### Period of authorisation and renewals

The operating authorisation is valid indefinitely throughout Brazil. New Law 13,097/15, which amended Law No. 6,360/76, establishes that operating authorisations are exempt from renewal.

#### Monitoring compliance and imposing penalties

ANVISA, as well as state and municipal entities, are responsible for inspecting and enforcing compliance with food and drug laws.

ANVISA, as well as state and municipal entities, can impose administrative penalties (such as fines) for a statutory sanitary infringement, after due administrative prosecution. Civil and criminal penalties can also be imposed, but only after civil or criminal court proceedings (not directly by ANVISA).

## MARKETING

### Authorisation and abridged procedure

### 9. What is the authorisation process for marketing medicinal products?

#### Application

The application (on forms PF1 and PF2) for each category of medicine is available at ANVISA's website.

#### Authorisation conditions

For a medicine to be registered, it must be proven, by means of scientific and analytical evidence, to be safe and effective for its intended use, and have sufficiently high quality, activity and purity for human use (*Article 16, Law No. 6,360/76*).

ANVISA's resolutions set out the specific and technical requirements for obtaining marketing approvals for:

- New medicines (*Resolution No. 60 of 10 October 2014*).
- Generic medicines (*Resolution No. 60 of 10 October 2014*).
- Branded drugs (so-called similar medicines) (*Resolution No. 60 of 10 October 2014*).
- Biological products (*Resolutions No. 55 of 16 December 2010 and No. 49 of 20 September 2011, amended by Resolution No. 24 of 14 May 2013*).

In the Official Gazette of 13 October 2014, ANVISA published Resolution No. 60/2014, an update of the technical requirements for marketing authorisation of new medicines, generic medicines and branded drugs (similar medicines). The Resolution replaces Resolution No. 136 of 29 May 2003, Resolution No. 16 of 2 March 2007 and Resolution No. 17 of 2 March 2007 on the matter.

#### Key stages and timing

The key steps in the procedure for obtaining marketing approval are:

- Filing the application and additional documentation.
- Analysis by ANVISA.
- Publishing the approval in the *Official Gazette*.

The whole process generally takes from one to two years, depending on the category of the medicine.

## Fee

ANVISA charges fees for issuing and revalidating marketing approvals (*Annex II, Law No. 9,782/99, amended*). The fees vary depending on the type of product and on the size of the company, according to Annex I of Resolution No. 222 of 28 December 2006, which is available on ANVISA's website.

## Period of authorisation and renewals

By means of Law 13,097/15, ANVISA will define the deadline for marketing authorisation renewals, not exceeding ten years, depending on the nature of the product and the health risk involved in its use.

For diet products, the marketing authorisation is valid for a two-year term (*Article 12, paragraph II, Law 6,360/76*).

## Monitoring compliance and imposing penalties

ANVISA, as well as the state and municipal bodies, are responsible for inspecting and enforcing compliance with food and drug laws. This includes monitoring the existence or lack of the necessary marketing authorisation.

ANVISA, as well as the state and municipal bodies, are also responsible for imposing administrative penalties for any statutory sanitary infringement, after due administrative prosecution.

## 10. What commitments and pharmacovigilance obligations apply after a company has obtained marketing authorisation? Are there further conditions concerning how the drug is distributed and accessible to patients?

ANVISA can undertake a control analysis of commercialised batches in official laboratories, to monitor the quality and compliance of the medicine with the medicine registration. When necessary, ANVISA can require companies to train ANVISA technicians, to enable them to undertake this monitoring.

Pharmaceutical industries also have a stake in the pharmacovigilance system, informing ANVISA of any problems with medicines. Law No. 6,360/76 establishes that these companies must notify the sanitary authorities of any adverse reactions caused by medicines. The rules governing pharmacovigilance on medicinal products for human use are set out in Resolution No. 4 of 10 February 2009, for which guidelines are established in Normative Instruction No. 14 of 27 October 2009.

Any registration changes involving alterations, inclusions or cancellations must follow the procedures specified in Resolution No. 48/2009, which is under public consultation No. 18/2015. If medicines are not marketed within a certain period, marketing approval may not be renewed.

## 11. Which medicinal products can benefit from the abridged procedure for marketing authorisation and what conditions and procedure apply? What information can the applicant rely on?

### Scope of abridged procedure

Medical products seeking marketing approval as generics or similar medicines (*Resolution No. 60 of 10 October 2014*) can benefit from an abbreviated marketing approval procedure.

### Conditions and procedure

**Similar medicines.** These must contain the same following characteristics as the reference medicine registered with ANVISA:

- Active ingredients.

- Concentration, dosage form, route of administration, strength and therapeutic, preventive or diagnostic indication.

A similar medicine can only differ in characteristics related to size and form of the product, expiry date, packaging, labelling, excipients and vehicles, and must always be identified by its trade mark.

As per Resolution No. 58 of 10 October 2014, ANVISA determined the possibility of interchangeability of similar medicines with reference medicaments, which means that similar drugs can have the same status as generics, once they have been shown to be therapeutically equivalent to the reference products, having the same efficacy and safety. However, relative bioavailability and pharmaceutical equivalence assays must be conducted as a requirement for their marketing authorisation. Similar medicines for which relative bioavailability and pharmaceutical equivalence have been shown are said to be pharmaceutically equivalent to the reference product registered with ANVISA (*Resolution No. 60/2014*).

This change in policy reflects a 2003 decision by ANVISA setting the end of 2014 as a deadline for similar medicines to submit bioequivalent testing for agency approval, which has always been required for generics.

**Generic medicines.** These are products similar to a reference/innovative product, which must be interchangeable with the reference/innovator product. Generics are usually produced after the expiration or waiver of patent protection or other exclusive rights, since their effectiveness, safety and quality are proven. They can be designated by either:

- DCB, that is, the Brazilian Common Denomination of the drug substance or the pharmaceutically active ingredient approved by ANVISA.
- In the absence of a DCB, the International Non-proprietary Name (INN) of the drug substance, or the pharmaceutically active ingredient recommended by the WHO.

To prove interchangeability for generic medicines, ANVISA requires the submission of bioavailability and bioequivalence assays:

- **Bioavailability.** This indicates the rate and extension of absorption of an active ingredient in dosage form, based on its concentration/time curve in the systemic circulation, or its excretion in urine.
- **Bioequivalence.** This demonstrates the pharmaceutical equivalence of products presented in the same pharmaceutical form, showing:
  - the same qualitative and quantitative composition of active ingredient(s); and
  - comparable bioavailability when studied under the same experimental design.

Further details on the specific procedure to be followed are in ANVISA Resolution No. 60/2014.

## 12. Are foreign marketing authorisations recognised in your jurisdiction?

A Brazilian marketing approval must still be obtained from ANVISA for a medicine with a foreign marketing approval. In the case of imported medicines and active pharmaceutical ingredients, in addition to the usual registration requirements, the company must also prove that the product is already registered in the country of origin (*Article 18, Law No. 6,360/76*) and complies with the GMP standards in that country.

## Parallel imports

### 13. Are parallel imports of medicinal products into your jurisdiction allowed?

IP laws prohibit parallel imports into Brazil. Trade mark and patent rights can be used to oppose parallel imports. An importer can have the IP law enforced against it.

ANVISA is responsible for the pharmacovigilance of imported pharmaceutical products in Brazil, including airports and ports (*Law No. 9,782/99*). ANVISA has been enforcing a very stringent rule which requires the importer of medicines to provide detailed information on, among other things, the source of the drug and the owner of the marketing authorisation (*Resolution No. 81 of 5 November 2008, amended by Resolution No. 28 of 28 June 2011*). If the importer satisfies the requirements of Resolution No. 81, ANVISA will issue an import licence and release the pharmaceutical products.

For information on pharmaceutical patents, trade marks, competition law, patent licensing, generic entry, abuse of dominance and parallel imports, visit *Pharmaceutical IP and Competition Law in Brazil: overview*.

## RESTRICTIONS ON DEALINGS WITH HEALTHCARE PROFESSIONALS

### 14. What are the restrictions on marketing practices such as gifts, sponsoring, consultancy agreements or incentive schemes for healthcare establishments or individual medical practitioners?

Giving or offering prizes or cash incentives to prescribing medical practitioners and pharmacies is forbidden (*Resolution No. 96 of 17 December 2008*). However, the distribution of institutional gifts, that is, gifts that do not advertise medicine, and of scientific papers, magazines or publications and technical books used for professional updates, are allowed (*Normative Instruction No. 5 of 20 May 2009*).

Free samples, distributed exclusively to prescribing practitioners, must contain at least 50% of the original packaging content, except for antibiotics (enough for complete treatment is mandatory) and contraceptives (full contents of the original package are mandatory). The packaging of these samples must contain the non-removable expression "free sample". Resolution No. 60 of 26 November 2009 prohibits the distribution of free samples of:

- Biological products that require special care for maintenance and transport.
- Medicine prepared by compounding pharmacies.

Further, it is not possible to distribute free samples of unregistered medicines at ANVISA, as well as non-commercialised presentations of them.

The distribution of medicine subject to special control is subject to more strict rules (*Ordinances No. 344 of 12 May 1998 and No. 9 of 29 January 1999*). Compliance with such rules does not exempt companies from full compliance with other determinations of Resolution 60/2009.

## SALES AND MARKETING

### 15. What are the restrictions on selling medicinal products? Are there specific regulations for the sale of medicinal products on the internet, by e-mail and by mail order?

According to ANVISA's Resolution No. 44 of 17 August 2009, pharmacist technicians can perform activities that are not exclusive to pharmacists, including dispensing/selling prescription medicines. However, the pharmacist technicians must be under direct supervision of the registered pharmacist technically responsible or a substitute (also a pharmacist), whose presence is required during opening hours of the commercial establishment. The sale of prescription medicines can only be made on presentation of a prescription.

The sale of medicine over the internet can only be undertaken by websites from pharmacies and drugstores with fixed commercial establishments, which are open to the public.

In addition, the company providing the service must provide a direct and immediate method of communication between the patient and a pharmacist. Drugs subject to special control (*Ordinance No. 344 of 12 May 1998*) cannot be sold on the internet.

The site should use only the electronic domain *com.br*, and must show on the main page, among other things, the following data and information:

- Name and registration number in the Pharmaceutical Council of the pharmacist in attendance.
- Alert messages and health recommendations from ANVISA.
- That prescription medicines will only be released on presentation of a receipt, and the means by which it can be presented to the establishment (fax, e-mail or otherwise).

Advertising prescription medicine over the internet is prohibited, unless the advertisement is only accessible by professionals who are able to prescribe or to dispense medicine (*see Question 16, Internet advertising*).

Resolution No. 96/2008 does not expressly mention e-mail messages, but it can be inferred that the term internet in this resolution includes e-mail messages (*see above, Internet*).

There are no particular rules referring to marketing medicinal products by mail order. In any event, this is not common in Brazil.

## ADVERTISING

### 16. What are the restrictions on advertising medicinal products?

#### Legislation and regulatory authority

Law No. 9,294 of 1996 and Decree No. 2,018 of 1996 impose restrictions on the use and advertising of smoking products, alcoholic beverages, drugs, therapies and agricultural pesticides, under section 4 of Article 220 of the FC 1988.

The rules relating to the advertising of medicinal products are contained in Resolution No. 96/2008 enforced by ANVISA. Medicines cannot be advertised unless they have a marketing authorisation from ANVISA.

ANVISA often sets fines for industries perceived as marketing ethical medicines to the general public, even where these involve disguised, non-direct advertising. A common practice used to avoid the advertising rules is to partner with medical societies to campaign for awareness and prevention of diseases, without specifically mentioning products. The National Council for Advertising Self-Regulation (CONAR), founded in 1980, has the authority to enforce the Brazilian Code of Advertising Self-Regulation, adopted in 1978. CONAR's objective is to eliminate the placing of advertisements and campaigns with misleading, offensive and abusive content, or that could, among other things, distort competition.

### Restrictions

Under Precedent No. 2 of 15 August 1988, prescription-only pharmaceuticals cannot be advertised to the general public, and any such advertising can be immediately withdrawn by CONAR. This precedent is based on Articles 1 and 50, and C, of the Brazilian Code of Advertising Self-Regulation. Prescription drugs can only be advertised to professionals who are able to prescribe or to dispense medicines.

Advertisements must not, among other things (*Article 8, Resolution No. 96/2008*):

- Stimulate and/or induce the indiscriminate use of medicines.
- Suggest or encourage diagnosis by the general public.
- Include images of people using the medicine.
- Employ words that encourage consumption of the medicine, for example, "have", "take", "use", "try", and so on.
- Advertise a drug as being new, if it has been on the market for more than two years (except for new therapeutic indications).
- Suggest that the patient's health could be endangered if he does not take the advertised medicine.

### Internet advertising

Advertising prescription medicine over the internet is prohibited, unless the advertisement is only accessible by professionals who are able to prescribe or to dispense medicine (*Article 29, Resolution No. 96 of 17 December 2008*). Pharmaceutical industries commonly operate restricted-access websites. Advertisements for non-prescription medicine on the internet must contain a warning concerning the active ingredient of the product.

## DATA PROTECTION

### 17. Do data protection laws impact on pharmaceutical regulation in your jurisdiction?

Brazilian statutory legislation provide for the protection of undisclosed test data that needs to be submitted to the Brazilian regulatory authorities to obtain official approval for the marketing of pharmaceutical products, patented or not. In fact, ANVISA is under an obligation to keep this sort of information secret. However, data package exclusivity for pharmaceutical products for human use is rather controversial.

It is important to highlight that the Civil Code (*section 21*) and the Federal Constitution (*Article 5, item X*) grant rights to privacy, according to which everyone has the right to keep secret certain information concerning their personal lives, which can certainly include aspects of their own health. The Good Clinical Practice of the Document of the Americas and Resolution No. 196/1996 of the National Health Council also grant confidentiality for the information of volunteers for clinical trials.

## PACKAGING AND LABELLING

### 18. Outline the regulation of the packaging and labelling of medicinal products.

#### Legislation and regulatory authority

Packaging and labelling requirements are set out in ANVISA's Resolution No. 71 of 22 December 2009. This is enforced by ANVISA.

#### Information requirements

Packaging must contain certain minimum information, including:

- The medicine's brand name (except for generics).
- The name of the active ingredient.
- The name and address of the owner of the marketing approval.
- The name of the manufacturer and place where the medicine is manufactured (country, state and city, in the case of imported products).
- The name and registration number of the pharmacist responsible for the medicine.
- The batch number.
- Manufacturing and validity dates.
- Marketing approval number.
- Information regarding the medicine's formula and composition, including weight and volume.
- Security stamp.
- The storage conditions, indicating the temperature range and storage conditions indicated by the medicine's stability study.
- The telephone number of the customer care service of the marketing approval holder, or the company producing the medicine.

#### Other conditions

There are also specific requirements for prescription medicines, and specific warnings regarding children, free samples and routes of administration. All the information that does not fit in the external packaging must be contained in the insert packaging. As well as Portuguese, the packaging must contain information in Braille (*Article 24, Resolution No. 71/09*).

## PRODUCT LIABILITY

### 19. Outline the key regulators and their powers in relation to medicinal product liability.

ANVISA is the main regulator and can, among other things:

- Order a recall.
- Impose penalties for non-compliance.
- Seize medicinal products.
- Suspend their distribution, commercialisation, and use.

### 20. Are there any mandatory requirements relating to medicinal product safety?

Resolution No. 55 of 17 May 2005 governs drug recall if there is sufficient evidence of or confirmation of non-compliance posing a

health risk, and if marketing authorisation has been cancelled due to safety and efficacy issues.

Notification of non-compliance/cancellation of marketing authorisation, including the reasons for non-compliance and classification of the health risk, must be submitted by holders to both ANVISA and the local sanitary authority:

- By e-mail, immediately after acknowledgement of the sufficient evidence/confirmation of non-compliance, or publication of marketing approval cancellation due to lack of safety and efficacy. The following must be included:
  - product name, registration number, presentation, batch number, manufacturing date, expiry date and manufactured or imported amount; and
  - a description of the non-compliance;
- By a specific form submitted to a particular ANVISA office, within 48 hours of the acknowledgement of the sufficient evidence/confirmation of non-compliance, or publication of marketing approval cancellation due to lack of safety and efficacy.

The publication of recall warnings by the marketing authorisation holder requires prior approval from ANVISA. The warning must be submitted to ANVISA for its approval within 72 hours of the acknowledgment of significant evidence/confirmation of non-compliance, or publication of marketing authorisation cancellation due to absence of safety and efficacy.

The entire recall procedure must be closely monitored by the marketing authorisation holder, by means of periodic reports and a final report to ANVISA after the procedure ends.

Resolution No. 54 of 10 December 2013 and Normative Instruction No. 6 of 18 August 2014 establishes rules for traceability of medicines, from manufacturing to marketing. All medicament packages should include a bidimensional code (Datamatrix) that allows attesting whether the product is genuine. The entire process is expected to be fully implemented in three years.

## 21. Outline the key areas of law applicable to medicinal product liability, including key legislation and recent case law.

### Legal provisions

Liability for defective medicinal products can arise under:

- The Consumer Protection Statute (*Law No. 8,078 of 11 September 1990*).
- The Criminal Code (*Decree-Law No. 2,848/1940*, as amended by several subsequent laws, particularly *Law No. 8,072/1990* and *No. 9,677/98*, which classify crimes against public health as serious crimes).
- Law No. 8,137 of 27 December 1990, which defines crimes against consumer relations.

### Substantive test

A pharmaceutical product is considered to be defective when it is unfit or inadequate for consumption, or when there are contradictions between the product and its packaging information. It can also be considered counterfeit when it has been deliberately and fraudulently mislabelled with respect to identity and/or source, including drugs:

- With correct ingredients but fake packaging.
- With the wrong ingredients.
- Without active ingredients or with insufficient active ingredients.

## 22. Who is potentially liable for defective medicinal products?

The following are potentially liable for defective pharmaceutical products (*Article 273, Criminal Code*):

- Anyone who falsifies, corrupts, adulterates or alters a product intended for therapeutic or medicinal uses.
- Anyone who imports, sells, displays for sale, stores for sale or, in any way, distributes or delivers for consumption a falsified, corrupted, adulterated or altered product.
- Anyone who commits these actions with products which:
  - do not have registration from ANVISA;
  - do not comply with the registered formulae;
  - do not have the necessary identity and quality required for their commercialisation;
  - have reduced therapeutic value or activity; or
- are products of unknown origin, or are acquired from an establishment that does not have the necessary operating authorisation.

The Brazilian or foreign manufacturer, producer, importer and seller of the defective pharmaceutical products are jointly liable (*Consumer Protection Statute*).

There is no specific regulation on off label use and physician liability in Brazil. ANVISA's Resolution No. 47, of 8 September 2009 sets out that the prescribing information/package insert is the only sanitary legal document that contains technical and scientific information and guidelines on drugs for their rational use.

## 23. What defences are available to product liability claims?

There is no liability if any of the following is proven (*Article 12, Consumer Code*):

- The product has not been placed on the market.
- The product has no defect.
- The defect or damage arises exclusively from the consumer's fault.

## 24. How can a product liability claim be brought?

### Limitation periods

There is a five-year limitation period for consumers bringing claims for damages caused by defective products. For criminal complaints, the limitation period can rise up to 20 years, depending on the maximum penalty applied to the crime (*Article 109, Criminal Code*).

### Class actions

Class actions are allowed, and are quite common, for groups of consumers claiming damages (civil liability) for defective products.

## 25. What remedies are available to the claimant? Are punitive damages allowed for product liability claims?

The claimant can file a civil lawsuit claiming damages (civil liability). The Public Prosecutor's Office is responsible for bringing criminal lawsuits.



Although it is possible to find some decisions applying punitive damages, this is a controversial issue in Brazil.

## REFORM

### 26. Are there proposals for reform and when are they likely to come into force?

Currently, there are several bills related to IP, food and drug matters being considered by Congress. The most important ones are the following:

- Bill No. 4,961/2005, which aims to amend the IP Law, so that substances or materials isolated from nature which meet the patentability requirements and are not mere discoveries are patentable. This Bill is currently awaiting the opinion of the Chamber of Deputies' Committee on Economic Development, Industry and Trade. It is doubtful whether it will be adopted into law.
- Bill No. 3,995/2008, which proposes the exclusion from patentability of new therapeutic uses of known compounds and novel polymorphic forms. It is doubtful whether it will be adopted into law.
- Bill No. 3,943/2012 which aims to amend Article 229-C of the IP Law, to specify that the prior consent analysis carried out by ANVISA in pharmaceutical patent applications includes examination of patentability requirements.
- Bill No. 5,402/2013, which proposes substantial amendments to the IP Law, including:
  - limitation of the patent term at 20 years maximum;

- non-patentability of new property or use of a known substance, or simple use of a known process, except if it does not result in a new product; and
- harmonisation of ANVISA's prior consent mechanism for pharmaceutical patents (Article 229-C) with ANVISA's Resolution No. 45/2008 as amended by Resolution No. 21/2013.

A rule issued by ANVISA concerns compounding pharmacies, which are very common in Brazil (*Resolution No. 67 of 8 October 2007*). This rule sets stringent requirements, and prohibits the compounding of medicines of the same presentation as those which already have marketing approval from ANVISA. The rule states that compounded medicines are an exception, and should only be marketed on a customised basis (that is, for each patient in need of a different dosage or pharmaceutical form of the industrialised drug).

However, in practice, many compounding pharmacies produce medicine with the same doses of manufactured products available on the market. In addition, it is common to find the drug association products with the same doses provided by the industry in presentations of individual drugs. ANVISA does not require proof of efficacy and safety of these products. Up to the present moment, there are no proposals to reform the regulation of this issue.

For information on pharmaceutical patents, trade marks, competition law, patent licensing, generic entry, abuse of dominance and parallel imports, visit *Pharmaceutical IP and Competition Law in Brazil: overview*

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## ONLINE RESOURCES

### Brazilian Presidency's website

W [www4.planalto.gov.br/legislacao](http://www4.planalto.gov.br/legislacao)

**Description.** This is the Brazilian Presidency's website. All federal laws and presidential decrees currently in force are available at this address. The legislation is constantly updated, but it is provided in Portuguese only.

### ANVISA

W [www.anvisa.gov.br](http://www.anvisa.gov.br)

**Description.** All resolutions enacted by ANVISA are made available at its official website. However, the material is provided only in Portuguese. Its contents are regularly updated.

### INPI

W [www.inpi.gov.br](http://www.inpi.gov.br)

**Description.** INPI makes available all its resolutions, including its guidelines for examination, at its official website. The address is updated frequently, but most material is only available in Portuguese. Versions of the Brazilian Patent and Trademark Act in English, French and Spanish are available. Those versions are only for information purposes and do not have any binding effect.

## Practical Law Contributor profiles



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**Professional associations/memberships.** Brazilian Association of Intellectual Property (ABPI); Brazilian Association of Industrial Property Agents (ABAPI); International Association for the Protection of Intellectual Property (AIPPI); American Intellectual Property Law Association (AIPLA); ABPI Biotechnology Commission; AIPLA Biotechnology and IP Commissions for Latin America.



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### Recent transactions

- Succeeded in two lawsuits representing a major Brazilian jeweller unduly accused of copyright infringement.
- Negotiated an agreement for the construction of a new shipyard in Brazil.
- Negotiated an agreement for the setting-up of a new technological company in the oil and gas industry.

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**Publications.** *Direito Tributário Internacional e a Tributação da Transferência de Tecnologia (International Tax Law and the Taxation of Technology Transfer)*, 1996.