DEUTSCH-BRASILIANISCHE INDUSTRIE- UND HANDELSKAMMER • VOL.1 • 2023

RECHT & STEUERN

NEWSLETTER

Gefördert durch:
Bundesministerium für Wirtschaft und Klimaschutz
aufgrund eines Beschlusses des Deutschen Bundestages

DE INTERNATIONAL

AHK MERCOSUL
Deutsch-Brasilianische Industrie- und Handelskammer
Câmara de Comércio e Indústria Brasil-Alemanha

PN ST Pacheco Neto Sanden Teisseire Advogados
EMDOC
FCR Law / Fleury, Coimbra & Rhomberg Advogados
SONIA MARQUES DÖBLER ADVOGADOS
Sperling Advogados
MACHADO ASSOCIADOS
BHERING ADVOGADOS
TAUIL | CHEQUER MAYER | BROWN
Lefosse
Rödl & Partner
Stüssi-Neves Advogados

Inhalt

Andreas Beyersdorf
Partner
abeyersdorf@pnst.com.br

Dr. Julia Krautter Romeiro
Counsel
jkrautter@pnst.com.br

Pacheco Neto Sanden Teisseire Advogados*
Al. Franca, 1050 - 10º e 11º andar
01422-001 - São Paulo - SP/Brasil
T (+55) 11 3897 4400 / 3063 6177
F (+55) 11 3063 6176
www.pnst.com.br

PN ST Pacheco Neto Sanden Teisseire Advogados

Bestellung von Geschäftsführern mit Wohnsitz im Ausland für Gesellschaften mit Sitz in Brasilien

1. Gesetzliche Grundlagen

Am 26. August 2021 wurde das Gesetz Nr. 14.195/2021 verabschiedet. Es soll das Unternehmensumfeld in Brasilien vereinfachen und entbürokratisieren und geht auf die Umwandlung der vorläufigen Maßnahme Nr. 1.040/2021 in ein Gesetz zurück. Diese Initiative des Wirtschaftsministeriums, die mit dem Ziel vorgeschlagen wurde, die Einstufung Brasiliens im "Doing Business"-Ranking der Weltbank zu verbessern, bewertet die "Erleichterung der Geschäftstätigkeit und die Qualität des regulatorischen Umfelds für Unternehmer in 190 Ländern".

Unter den zahlreichen Änderungen, die durch das Gesetz Nr. 14.195/2021 eingeführt wurden, ist eine der wichtigsten die Möglichkeit, nicht in Brasilien wohnhafte Direktoren für Aktiengesellschaften mit Sitz in Brasilien zu wählen. Vor dem genannten Gesetz konnten sowohl brasilianische als auch ausländische nicht in Brasilien ansässige Personen in den Verwaltungsrat der Gesellschaft aufgenommen werden, waren aber daran gehindert, Positionen in der Geschäftsführung zu besetzen, die eine Vertretung der Gesellschaft voraussetzen.

In diesem Zusammenhang konnten ausländische natürliche Personen nur dann eine Geschäftsführungsposition bekleiden, wenn sie ihren Wohnsitz in Brasilien hatten, d.h. wenn sie über ein dauerhaftes Visum verfügten. Damit sollte sichergestellt werden, dass die Vertreter des Unternehmens im brasilianischen Hoheitsgebiet anzutreffen sind, damit sie alle an das Unternehmen gerichtete Mitteilungen, Bescheide und/oder Zustellungen entgegennehmen können.

In diesem Sinne wurde auch Artikel 146, Absatz 2 des Gesetzes Nr. 6.404/76 ("S/A-Gesetz") durch das Gesetz Nr. 14. 195/2021 geändert und sieht nun vor, dass ein im Ausland wohnhafter Geschäftsführer "einen im Land wohnhaften Bevollmächtigten bestellen muss, der befugt ist, bis mindestens 3 (drei) Jahre nach Beendigung der Amtszeit des Geschäftsführers Zustellungen in Gerichtsverfahren entgegenzunehmen, die aufgrund des Gesellschaftsrechts gegen ihn eingereicht werden, sowie Zustellungen und Vorladungen in Verwaltungsverfahren, die von der Börsenaufsichtsbehörde („CVM“) eingeleitet werden, wenn er die Geschäftsführung einer börsennotierten Gesellschaft ausübt".

Mit der Normativen Verordnung Nr. 112/2022 hat die Nationale Behörde für Unternehmensregistrierung und -integration („DREI“), die die Handelsregister der verschiedenen brasilianischen Bundesländer beaufsichtigt und reguliert, im Anschluss an die Änderung des Gesetzes über das Unternehmensumfeld für Aktiengesellschaften festgelegt, dass Gesellschaften mit beschränkter Haftung auch im Ausland ansässige Geschäftsführer ernennen können.

Daher kazn derzeit ein Mitglied der Geschäftsführung, ob Brasilianer oder Ausländer, seinen Wohnsitz außerhalb Brasiliens haben, sofern es einen in Brasilien wohnhaften Bevollmächtigten bestellt.

2. Praktische Aspekte

Mehr als ein Jahr nach Inkrafttreten des Gesetzes Nr. 14.195/2021 haben sich die Verfahren bei den zuständigen Stellen jedoch nicht geändert, um die Bestellung eines nicht in Brasilien wohnhaften Geschäftsführers in der Praxis zu ermöglichen.

Mit dem Gemeinsamen Schreiben SEI Nr. 28/2022/ME, vom 2. Mai 2022, gab die DREI den Handelsregistern der verschiedenen brasilianischen Bundesländer einige Richtlinien in Bezug auf die Eintragung der gesellschaftsrechtlichen Dokumente zur Bestellung der im Ausland wohnhaften Geschäftsführer.

Bis heute wurde jedoch das „Redesim“, das für die Vereinfachung der Registrierung und Legalisierung von Unternehmen und Betrieben zuständige System, nicht dahingehend aktualisiert, nicht in Brasilien wohnhafte Geschäftsführer in den Nationale Kataster für juristische Personen („CNPJ") aufzunehmen.

In Anbetracht der Tatsache, dass für die Eintragung des Gesellschaftsvertrages / der Gesellschaftsvertragsänderung / des Gesellschafterbeschlusses, der die Bestellung des Geschäftsführers enthält, die Grundeintragungsurkunde ("DBE") erforderlich ist, die von dem „Redesim“ ausgestellt wird, ist es mehreren Unternehmen nicht gelungen, die Gesellschaftsunterlagen einzutragen und damit den Geschäftsführer zu bestellen.

Die Schwierigkeiten entstanden hauptsächlich in Fällen, in denen der im Ausland wohnhafte Geschäftsführer der einzige Geschäftsführer der Gesellschaft mit Sitz in Brasilien war und noch nicht über die Eintragung in dem Kataster der natürlichen Personen („CPF“) bzw. Steuernummer, und ebenfalls nicht über ein sogenanntes e-CPF, ein digitales Zertifikat, das als digitale Steuernummer und Unterschrift dient, verfügte, die für die Beantragung und Ausstellung des DBE erforderlich sind.

Die DREI hat mit dem Gemeinsamen Schreiben SEI Nr. 28/2022/ME klargestellt, dass die Änderungen im CNPJ-System derzeit geprüft werden und dass die Handelsregister bis zur Anpassung des Systems den Gesellschaftsvertrag / die Gesellschaftsvertragsänderung / den Gesellschafterbeschluss ohne Vorlage der DBE eintragen müssen.

Pacheco Neto Sanden Teisseire Advogados*
Al. Franca, 1050 - 10º e 11º andar
01422-001 - São Paulo - SP/Brasil
T (+55) 11 3897 4400 / 3063 6177
F (+55) 11 3063 6176
www.pnst.com.br

Nach der Eintragung des Gesellschaftsaktes mit der Bestellung eines im Ausland wohnhaften Geschäftsführers muss das Handelsregister ein Schreiben an das Finanzamt („Secretaria da Receita Federal“) senden, in dem es über die Eintragung des Aktes informiert, damit dieses die Aktualisierung des CNPJ der betreffenden Gesellschaft vornimmt, um die Datenbank der Agenturen synchron zu halten. Die Dauer für diese Aktualisierung ist unterschiedlich und schwer einzuschätzen.

Die Richtlinien der DREI haben die Schwierigkeiten bei der Bestellung eines im Ausland wohnhaften Geschäftsführers in Brasilien zum größten Teil beseitigt, so dass Gesellschaften, die eine solche Bestellung beabsichtigen, mit der Registrierung der Unterlagen beginnen können.

Nicht zuletzt ist zu erwähnen, dass falls der im Ausland wohnhafte Geschäftsführer der einzige Geschäftsführer der Gesellschaft mit Sitz in Brasilien ist, er aufgrund verschiedener praktischer Umstände wie z. B. die Abgabe bestimmter erforderlicher Erklärungen an die Behörden in der Regel über eine Eintragung in dem Kataster der natürlichen Personen („CPF“) bzw. Steuernummer und ebenfalls über ein e-CPF (digitales Zertifikat) verfügen müssen wird, auch wenn er nicht in Brasilien steuerpflichtig ist.

Falls die Gesellschaft andere Geschäftsführer hat, ist eine solche Eintragung bzw. ein solches Zertifikat nicht unbedingt erforderlich. Es empfiehlt sich jedoch zu prüfen, ob die brasilianische Bank, bei der die Gesellschaft ihr Konto hat, die Bewegung von Konten durch Geschäftsführer ohne Eintragung im CPF zulässt.

*Autor der Publikationen ***So Geht's die Limitada in Brasilien***

The Appointment without an administrator work visa (Director visa) for an immigrant who is living out of Brazil (Resident Abroad) for Companies with Headquarters in Brazil - Is this act acceptable by the Brazilian immigration authorities even in Limited liability companies?

Renê Ramos
Partner
rene.ramos@emdoc.com
T (+55) 11 3405 7803

EMDOC*
R. Luís Coelho, 308
01309-000 - São Paulo - SP/Brasil
T (+55) 11 3405 7800
www.emdoc.com

With the advent of Federal Law 14,195 of 08/26/2021, which provided, among other matters, for reducing corporate bureaucracy, Brazilian law allowed the possibility for a foreign administrator to manage a Brazilian company, even if he/she is not a resident in Brazil, but has a legal representative residing in the country, with powers for, up to, at least, 3 years after the end of the administrator's term of office, to receive: (i) citations in actions against him/her proposed based on corporate law; and (ii) citations and intimation in administrative proceedings filed by the Securities and Exchange Commission, in the case of holding a management position in a publicly-held company.

With regard to joint-stock companies ***(Sociedades Anômimas)***, it seems to us that the matter does not generate controversy, considering that Federal Law 14,195 of 08/26/2021 amended article 146, paragraph 2. of Federal Law 6,404 of 12/15/1976, that is, the Law of joint-stock companies. However, a subject that generates controversy refers to the possibility for non-resident foreign managers to enjoy the effects of Federal Law 14,195 of 08/26/2021 in limited liability companies ***(Sociedades Limitadas)***.

In consultation with the Brazilian Immigration Coordination, we received the following response on the subject on 10/08/2021:

> *“In keeping with Your Lordship's consultation, dated September 22, 2021, which deals with the opinion request of this General Coordination of Labor Immigration on Federal Law 14.195, of August 26, 2021, we have the following considerations:*
>
> *Foreign administrators who do not intend to reside in the country may carry out their administrative acts abroad, provided they have an attorney in Brazil, and, in this case, they do not need a work and investment residence permit.*

EMDOC*
R. Luís Coelho, 308
01309-000 - São Paulo - SP/Brasil
T (+55) 11 3405 7800
www.emdoc.com

The non-resident administrator, who intends to later become a resident administrator, will need to previously obtain a residence permit, before this Ministry of Justice and Public Security, and in this context, the requesting company must prove the requirements demanded by Normative Resolution nº 11, 2017, from the National Immigration Council.

Finally, regarding chapter III of the said Law, referring to the protection of minority shareholders, the caput of article 5 is specific when it prescribes that Law N. 6,404 of 12/15/1976 comes into force with the disciplined changes in the norm, therefore, it is understood that such a device is effective only for joint-stock companies."

We also had the publication of Normative Instruction DREI/ME nº. 112 of 01/20/2022 which in its Device 4.5 (Administration) and 10 (Member of the Board) provide:

"4.5 - The administrator of the limited liability company may reside abroad. In this case, you must attach to the process itself or file it in an autonomous process, a power of attorney granted to your representative in Brazil, with powers to, up to at least 3 years after the end of the term, receive citations and intimations in lawsuits or administrative proceedings."

"10 - Directors must be natural persons, whether or not they may be resident or domiciled in Brazil. If the director is resident or domiciled abroad, the same rule as the administrator must be observed, that is, to appoint a representative residing in the country (art. 146 of Law No. 6,404, of 1976)."

After the advent of this rule, we made the same query to the Brazilian Coordination of Immigration, but until now we have not received a response.

Therefore, the question arises, after all, is a resident foreign administrator allowed to manage limited liability companies or not?

We believe that great caution should be exercised on the subject since, as we pointed out earlier, we do not have a positive response from the Brazilian immigration authorities on the subject and they are the ones who grant administrators residences (visas) to foreigners based on Federal Law 13,445/2017 (Foreigner Law), Regulatory Decree 9.199/2017 and Normative Resolution no. 11/2017 of the National Immigration Council.

If the Brazilian Coordination of Immigration understands that these migrants need residence (visa) to manage limited Brazilian companies **and the migrants** do not have these authorizations, their acts may be considered **null (illegal).**

In addition to the legal, economic and social consequences generated by this serious situation, the migrant himself/herself can be deported in accordance with article 187 of Federal Decree 9,199/2017.

We are aware that the article 1053 of the Brazilian Civil Code and its sole paragraph determine that the Articles of Incorporation may provide for the limited liability company to be governed by the rules of the for joint-stock companies.

Thus, if the Articles of Incorporation state that the rules of Law 6,404/1976 are applied in a supplementary manner in limited liability companies, we understand that there is a good defense to admit the possibility of non-resident foreign directors to manage Brazilian limited liability companies without a work residence (visa).

From all of the above, we conclude that there is no doubt as to the possibility of non-resident foreign directors managing joint-stock companies **considering that** they have an attorney **based on** the current article 146, paragraph 2. of Federal Law 6,404 of 12/15/1976. **On the other side for limited** liability companies, we recommend requesting a work residency until the matter is **duly** clarified by the Brazilian immigration authorities in order to avoid **any legal discussions and risks for all people involved and also for the company in Brazil.**

*Author of the publication ***So geht's Visum in Brasilien***

EMDOC*
R. Luís Coelho, 308
01309-000 - São Paulo - SP/Brasil
T (+55) 11 3405 7800
www.emdoc.com

Dr. iur. Renata Camilo, LL.M
Partner
renata.camilo@fcrlaw.com.br

Izabella Gasparini Martins
Associate
izabella.gasparini@fcrlaw.com.br

FCR Law – Fleury, Coimbra & Rhomberg Advogados*
Rua do Rocio, 350 - 10º andar
04552-000 - São Paulo - SP/Brasil
T (+55) 11 3294 1600 / 3063 6177
www.fcrlaw.com.br

FCR Law / Fleury, Coimbra & Rhomberg Advogados

Foreign Exchange Framework: Overview and Regulation of Foreign Capital in Brazil

I. Overview

Law no. 14.286/21 (the "Foreign Exchange Framework"), which came into effect on 30 December 2022, drastically altered the legal framework for: (a) the Brazilian foreign exchange market; (b) foreign capital held in Brazil; (c) Brazilian capital held abroad; and (d) reporting requirements to the Central Bank of Brazil ("Bacen").[1]

The Foreign Exchange Framework seeks to simplify the rules applicable to international transfers and modernize the Brazilian foreign exchange laws by repealing over 40 regulations, some of which were very outdated. It is an important step towards liberalizing and increasing the efficiency of the Brazilian foreign exchange market.

In addition to the alterations concerning foreign capital (which are discussed in more detail in the following section), the Foreign Exchange Framework also introduced the following modifications among others:

a. Individuals may sell foreign cash up to a limit of USD 500, provided it is done occasionally and not professionally;

b. Increase of the maximum cash that each passenger may carry when entering or leaving Brazil, from BRL 10,000 to USD 10,000 or its equivalent in another currency;

c. Streamlining the process of opening and maintaining bank accounts in BRL held by non-residents;

d. Starting from 01 July 2023, Fintechs classified as Payment Institutions by Bacen will be allowed to operate in the foreign exchange market in transactions not exceeding US$ 100,000 such as the sale of currencies and transfer of funds abroad;

e. Reduction of the number of classification codes for exchange operations (cf. BCB Resolution no. 277/2022).

[1] In order to regulate the new Foreign Exchange Framework, the National Monetary Council ("CMN") issued CMN Resolutions no. 5,042 and no. 5,056 on 25 November 2022 and 15 December 2022, respectively. Furthermore, Bacen published BCB Resolutions nos. 277, 278, 279, 280 and 281, on 31 December 2022.

II. Foreign Capital in Brazil

The definition of "foreign capital" still includes foreign direct investments and foreign credits, but the definitions of both have been subject to certain changes. From 31 December 2022, Brazilian companies must report foreign capital to the Central Bank of Brazil if the value of the foreign capital exceeds certain thresholds set forth by BCB Resolution no. 278/2022. This replaces the broad reporting obligation previously in place.

From 31 December 20222, foreign credits (regardless of whether they are transferred to Brazil or remain abroad) must be registered in the newly named SCE-Crédito system (former RDE-ROF system) in the following cases only:

a. loans, securities or financing involving an amount equal to or greater than USD 1,000,000;

b. import financing transactions with a term exceeding 180 days and involving an amount greater than USD 500,000;

c. anticipated receipt of exports and financial leasing with a term exceeding 360 days and involving amounts exceeding USD 1,000,000; and

d. foreign credit transactions contracted by the Brazilian Public Administration.

Furthermore, royalty agreements between residents and non-residents related to the use or assignment of patents, industrial or commercial brands, technology supply or technical services, as well as external operational leases, rentals, and affreightments no longer need to be registered with Bacen.

Lastly, Bacen now expressly permits the disbursement of credit transactions directly abroad whenever a Brazilian and a non-resident individual or company enter into financing or loan transactions. In the past, foreign credit transactions in Brazil were contingent upon the actual inflow of funds.

The definition of **foreign direct investment** has been significantly altered: It is no longer restricted to non-residents directly investing in the corporate capital of a Brazilian company, but also includes any other economic rights of the non-resident acquired from an act or agreement, as long as the return of the investment is linked to the performance of the business, such as the participation in a consortium or partnership.

The registration of foreign direct investments in the newly named SCE-IED system (former RDE-IED system) is mandatory only in the following cases:

a. financial transfer performed by a non-resident investor of an amount equal to or greater than USD 100,000;

b. transactions (such as corporate reorganizations, share assignments, exchange and contribution of shares, reinvestments, distribution of profits, payment of interest on equity, etc.) in an amount equal to or greater than USD 100,000; and

FCR Law – Fleury, Coimbra & Rhomberg Advogados*
Rua do Rocio, 350 - 10º andar
04552-000 - São Paulo - SP/Brasil
T (+55) 11 3294 1600 / 3063 6177
www.fcrlaw.com.br

c. companies subject to periodic declaration requirements (as will be described below).

Companies with foreign direct investment must only provide periodic declarations to the Central Bank if they meet certain criteria:

a. companies with total assets equal to or greater than BRL 300,000,000 must make quarterly declarations;

b. companies with total assets equal to or greater than BRL 100,000,000 must make annual declarations; and

c. companies with total assets equal to or greater than BRL 100,000 must make quinquennial declarations.[2]

III. Final Remarks

The recently implemented Foreign Exchange Framework has not dramatically liberalized the Brazilian foreign exchange market; for instance, it has not resulted in considerable alterations regarding who is allowed to maintain foreign currency accounts in Brazil. However, the new system is certainly a beneficial tool for decreasing the often excessive bureaucracy linked to the Brazilian foreign exchange market and drastically cutting down the reporting requirements for foreign capital in Brazil.

*Author of the publications ***So Geht's Compliance in Brasilien and So Geht's Investieren in Brasilien***

[2] With respect to 2023, Bacen issued BCB Resolution no. 281/2022 with transitional rules establishing the obligation for Brazilian companies with owners' equity equal to or greater than US$100,000,000 on 31 December 2022.

Brazil´s new guidelines for transfer pricing: MP 1,152/2022

Thais Araújo
Senior Laywer
thais.araujo@dobler.com.br
C. (+55) 11 98101-1757

Sonia Marques Döbler Advogados*
Rua Dona Maria Paula, 123
19º andar - Edifício Main Offices
01319-001 - São Paulo - SP/Brasil
T (+55) 11 3105 7823
F (+55) 11 3105-5540
www.dobler.com.br

2023 starts off with major changes to Brazil´s political, economic and legal environment. The presidential election shifted the federal government´s public policies, with direct outcomes to our current tax practices. However, before the administration announced their new fiscal plan, the legislation enacted by the end of 2022 already promoted significant adjustments in the daily routine of international companies doing business in Brazil.

By the provisional executive order "MP 1,152/2022", published on December 29th, 2022, new guidelines for transfer pricing were provided to multinational companies based in Brazil and their associated enterprises abroad. In essence, transfer pricing consists of guidelines for pricing adjustment in transactions between associated enterprises, which aims at replicating market forces and standards applicable to similar operations with independent companies.

In Brazil, the transfer pricing rules are required for asserting the tax basis of the Corporate Income Tax ("IRPJ") and the Social Contribution on Net Income ("CSLL"), in procedure that, prior to MP 1,152/2022, was ruled by articles 18 and 19 of Law n. 9,430/1996 and its related infralegal rules (i.e., a Government act that has the form of law, but not the force of law).

- **The Past: Articles 18 and 19 of Law n. 9,430/1996**

Articles 18 and 19 of Law n. 9,430/1996 define a list of transfer pricing methods, which consist of pre-determined calculation methods to be selected at the taxpayers' discretion, with the exception of commodities-related transactions, which follow a specific method ("PCI and PCEX"). In other words, the taxpayer is entitled to choose the method that better suits it, but, once chosen, there is no room as to how it will be executed, since the companies are bound by the parameters outlined by the law for the specific elected method.

Without a doubt, the adoption of a fixed set of criteria reduced the litigation towards transfer pricing in Brazil, as it creates predictability for similar operations. On the other hand, it goes without saying that the Brazilian tax treatment was not aligned with the international transfer pricing rules, a discrepancy with impacts to the double taxation and/or tax avoidance.

Since the beginning of the negotiations between the Organisation for Economic Cooperation and Development (OECD) and Brazil´s Federal Government, it was expected that, as an outcome, our legislation was altered to converge with the international transfer pricing standards, which, in fact, took place with the enactment of MP 1,152/2022.

Sonia Marques Döbler Advogados
Rua Dona Maria Paula, 123
19º andar - Edifício Main Offices
01319-001 - São Paulo - SP/Brasil
T (+55) 11 3105 7823
F (+55) 11 3105-5540
www.dobler.com.br

SONIA MARQUES DÖBLER ADVOGADOS

- **The Future: MP 1,152/2022 and Alignment with International Standards**

MP 1,152/2022 shifted the parameters applied to transfer pricing in Brazil, as it distances from the pre-determined methods, favouring a more versatile system, in line with the practices in force in OECD member countries, giving room to the analysis on a case-by-case basis of the more suitable method for the taxpayer.

Therefore, the current legislation introduces the new standards by fully enforcing the arm's length principle, which is the international transfer pricing guideline used for tax purposes by OECD member countries and aims at ensuring that transactions between associated enterprises follow the same conditions imposed to unrelated parties. A tax adjustment according to the arm's length principle takes into consideration all the factors in connection with the transaction, by comparing the facts, the circumstances and the effective conduct of the parties and not only a strict calculation method.

Under these premises, the provisional executive order intends to replicate the dynamics of market forces, applying the economic aspects of a transaction throughout the legal comparability analysis and process. Albeit beneficial, one must emphasize that the Brazilian taxpayer is not used to this broadness of criteria in their daily tax practices, reason why the legislation creates different arrangements to stimulate convergence with Brazil´s new transfer pricing guidelines.

Important highlights:

- **Tax Rulings: Advance Pricing Arrangements**

Article 39 of MP 1,152/2022 creates a tax ruling procedure whereby the taxpayer submits a consultation to the Brazilian Federal Revenue Office as a way to obtain orientation, in advance, about the appropriate transfer pricing method to a specific transaction.

The instrument follows the Advance Pricing Arrangements (APA) process, widely executed in OECD member countries for the determination of a set of criteria, methods and needed adjustments for a controlled transaction between associated enterprises. To be submitted, the tax ruling procedure demands the payment of a fee, in the amount of BRL 80,000.00, and the Federal Tax Authorities´ response will be applicable over a period of 4 (four) years, extendable for a 2 (two) year period upon a BRL 20,000.00 fee.

- **Simplification Methods**

The guidelines assign to the Brazilian Federal Revenue Office the duty to provide the taxpayers with orientation and simplification methods for transfer pricing transactions. The Federal Authorities will enact normative rules related to the matter, in order to discipline and simplify the enforcement of the law, by regulating examples, comparability analysis of transactions and fiscal procedures imposed to taxpayers, among others.

- **Tax Proceedings**

Multinational enterprises subject to transfer pricing rules will now be bound to a tax monitoring proceeding conducted by the Federal Revenue Office. Article 35 of MP 1,152/2022 establishes that the parties must report information and related documents regarding controlled transactions to the Tax Authorities. The obligation will be enforceable whenever a new controlled transaction takes place as from 2024 (year when the MP becomes effective).

Failure to comply with the tax proceeding results in the imposition of assessment and penalties asserted over the corresponding adjustments to the income "IRPJ" and "CSLL" tax basis, which means that the cooperation with the Tax Authorities during the monitoring proceeding is mandatory to all associated companies doing business in Brazil.

- **Royalties**

At last, the legislation brings an important advancement by assuring the taxpayers the right to deduct royalties and technical services payments (or alike) from the actual profit, basis for the calculation of IRPJ and CSLL income taxes, since the executive provisional order revokes the percentage limit imposed for the deduction of said payments.

However, article 45 of MP 1,152/2022 stipulates that if the royalties or the technical services payments are remitted to tax haven jurisdictions and/or preferential tax regime jurisdictions, leading to a double non-taxation scenario, the sums will not be deductible when asserting the Brazilian income taxation.

- **MP 1,152/2022 Effectiveness**

Article 48 of MP 1,152/2022 determines that the new transfer pricing guidelines will come into effect as of January 1st, 2024, but taxpayers also have a right to choose for the new standards as of 2023, as long as they expressly inform their choice to the Brazilian Federal Revenue Office.

Nonetheless, the effective date defined by article 48 is not the only condition that withholds the new standards' full effect. In fact, the validity of the transfer pricing rules exceeds the adjustment period and culminate in our country´s political scenario and its consequences to Brazil´s pathway to converge with OECD´s guidelines. This is a result of our legislative process, as it is stablished that a provisional executive order ("medida provisória") depends on Congress's approval to be converted into definitive legislation. At the beginning of the year, the current Government indicated interest in the conversion of MP 1,152/2022 into law, but no actual measures have been taken so far. This is something yet to come.

*Author of the publication ***So geht's M&A in Brasilien***

Sonia Marques Döbler Advogados
Rua Dona Maria Paula, 123
19º andar - Edifício Main Offices
01319-001 - São Paulo - SP/Brasil
T (+55) 11 3105 7823
F (+55) 11 3105-5540
www.dobler.com.br

SONIA MARQUES DÖBLER ADVOGADOS

Raphael Bessa
Senior Laywer
rbessa@sperling.adv.br

Sperling Advogados*
Av. 9 de Julho, 4.939, 6º andar
Torre Jardim – 01407-200
Jardim Paulista – São Paulo/SP
T (+55) 11 3704 0788
www.sperling.adv.br

Sperling Advogados

Recent developments and established tools for consumer protection in digital markets

New information technologies and artificial intelligence (AI) systems have increasingly shaped consumer markets in recent years. Driven by leading companies operating consumer-facing platforms, this development has often been portrayed as contributing to consumer welfare. Indeed, new data analytics and artificial intelligence approaches can bring value to consumers by lowering decision-making and transaction costs.

In consumer law and policy, the use of AI by major corporations raises the specter of a weakened position for the consumer and a market imbalance that may not be sustainable in the long run. AI, combined with big data, provides companies and platforms with enhanced knowledge and unprecedented abilities about their customers: the ability to identify their tastes and preferences, strengths, and weaknesses at scale, predict their reactions, and target them with personalized messages designed to induce desired behaviors.

There is a risk that consumers will be overpowered by AI rather than empowered if AI systems are developed primarily by companies and focused on serving their interests (such as increasing profits and market share). In both the private and public sectors, other areas being transformed by technological developments face similar challenges. Regulators worldwide have begun to consider the need for legislative responses to the growing sophistication of technology and the promises and dangers it brings.

In Europe, the adoption of Regulation 2016/679 on the Protection of Natural Persons regarding the Processing of Personal Data (GDPR) is often seen as an essential initial step towards increasing consumer autonomy in data-driven markets. Brazil approved Law No. 13.709/2018 ("LGPD"), which protects personal data and amends Federal Law No. 12.965/2014, known as the Civil Framework of the Internet.

Both laws create a horizontal framework consisting of principles (e.g., legality, fairness, transparency, data minimization) and rights of data subjects (e.g., transparency and information about processing, right of access, right to object), as well as numerous rules and obligations applicable to controllers and processors.

Recently, in the Brazilian Senate, a Commission of Jurists was responsible for preparing a draft substitute to direct the evaluation of Bills 5.051 of 2019, 21 of 2020, and 872 of 2021, which aim to establish principles, rules, guidelines, and reasons to regulate the development and application of artificial intelligence in Brazil. The final report was approved on December 1, 2022, and the draft is based on three central pillars: the guarantee of the rights of persons affected by artificial intelligence systems, as provided in Chapter II; the categorization of system risks, as provided in Chapter III; and finally, in Chapter IV, the governance of AI systems.

The increase in regulatory activity observed in recent years around online platforms, and AI should not be taken to mean that digital traders are operating in a legal vacuum. In contrast, existing horizontal instruments - including but not limited to the GDPR and the LGPD - address many universal issues relevant to digital consumer markets, particularly issues of fairness in consumer contracts and commercial practices, which have long been the subject of harmonized consumer rules.

In the academic discussion of fairness and good faith in consumer contracts, three main areas are subject to analysis:

1. How the pre-contractual negotiation phase is conducted, including the ability to give informed consent (so-called procedural fairness);
2. The actual terms of the contract that is entered, where the fairness of the allocation of rights and obligations is examined (substantive fairness);
3. The rules governing the interpretation of contracts and the filling of gaps in them, as well as the performance and modification of the contractual relationship and the remedies provided by law in the event of a breach of contract.

In today's economic reality, the areas mentioned above where fairness becomes an issue are a cause for concern, more so in some situations than others. That is particularly evident in the case of online consumer contracts, where a business provider offers its standard terms and conditions in "clickwrap" form, and the consumer is impatient to click "I agree" and gain access to a website or start using an application.

From the consumer's point of view, as with any standard form contract, most of these issues can fade into the background when starting a new relationship with an online service provider. The issue of fairness is reduced mainly to how the rules and obligations of the parties are formulated and described. In other words, the question of the actual transparency of the terms and content of the contract comes to the fore.

The pre-formulated standard contract has significant economic advantages. Traders rely on it to cover the full range of contractual relationships, often building on their experience in trying to account for circumstances and contingencies that may arise, thereby reducing transaction costs. However, such type of contract leaves little room for negotiation and limits the freedom of the customer to either accept or reject the entire agreement as written. The service provider, on the other hand, enjoys the considerable advantage of being able to meticulously craft the terms of the contract down to the last detail and can take as much time as it needs to do so.

Sperling Advogados*
Av. 9 de Julho, 4.939, 6º andar
Torre Jardim – 01407-200
Jardim Paulista – São Paulo/SP
T (+55) 11 3704 0788
www.sperling.adv.br

Sperling Advogados

Sperling Advogados*
Av. 9 de Julho, 4.939, 6º andar
Torre Jardim – 01407-200
Jardim Paulista – São Paulo/SP
T (+55) 11 3704 0788
www.sperling.adv.br

Sperling Advogados

Service providers often devote a significant portion of their terms of service (ToS) to disclaimers and limitations of liability. Most of the circumstances in which these limitations are stated significantly affect the balance of the parties rights and obligations, such as clauses limiting: (i) liability theory; (ii) causal link; (iii) kind of damages; (iv) standard of care; (v) cause; and (vi) compensation amount.

At a time when almost every website, application, and device with a screen has its Terms of Service, the time factor is becoming increasingly relevant, given the sheer volume of contracts that today's consumer is being asked to enter. That is is the best indicator that there is always a risk of a significant imbalance in the relative power of the parties, suggesting the need for legislative intervention. The existing horizontal rules on unfair terms in consumer contracts are designed precisely to reduce or redress this imbalance.

*Author of the publication ***So Geht´s Besteuerung von Unternehmen in Brasilien***

Levy of social security contribution on the payment of maternity leave extension

Law 11770/2008, which created the Programa Empresa Cidadã (Citizen Company Program), allows female employees of companies that adhere to the aforementioned program to request an extension of maternity leave for another 60 days, receiving their full remuneration from the company.

By means of Ruling No. 27/2023 of the General Taxation Coordination, the Brazilian Federal Revenue Service has recently expressed its understanding that the remuneration paid during the maternity leave extension resulting from the Empresa Cidadã Program is subject to the levy of social security contribution.

According to the Brazilian Federal Revenue Service, the purpose of the Empresa Cidadã Program is to extend the maternity leave – the period during which the employee is away from her professional activities due to the birth or adoption – and not the maternity leave pays, a social security benefit funded by Social Security and due to the employee to enable the right to leave from work during the 120 days of maternity leave.

It should be noted that the statement by the Brazilian Federal Revenue Service is in line with the thesis established by the Federal Supreme Court in the judgment of Extraordinary Appeal No. 576.967/PR (Topic No. 72 of General Repercussion), which considered the levy of social security contribution paid by the employer on the maternity leave pay to be unconstitutional, as follows: "2. Maternity leave pay is a social security benefit paid by the Social Security to the employee insured during the one hundred and twenty days she remains away from work due to maternity leave. It is, therefore, a real social security benefit. 3. As it is neither consideration for work nor remuneration due to the employment contract, the maternity leave pay is not included in the payroll and cannot be compared to other earnings from work paid or credited, in any capacity, to the individual who provides the service, even without an employment relationship. As a result, it cannot be included in the social security contribution calculation basis borne by the employer, and is not grounded on article 195, I, a, of the Federal Constitution."

As decided by the Federal Supreme Court, the amount received by the employee during the period away from work due to maternity leave does not typify as consideration for work or remuneration due to the employment contract. Therefore, we understand that there are legal arguments to support that there is also no levy of social security contribution on the payment of the maternity leave extension in the context of the Empresa Cidadã Program.

Cecilia Yokoyama
Partner
cyo@machadoassociados.com.br

Renato Silveira
Partner
rsi@machadoassociados.com.br

Marcel Augusto Satomi
Senior Laywer
mrs@machadoassociados.com.br

Machado Associados
Av. Brigadeiro Faria Lima, 1656 – 11º. andar
01451-918 - São Paulo - SP/Brasil
T (+55) 11 3819 4855
www.machadoassociados.com.br

Indeed, the amount paid by the company during the maternity leave extension is also intended to provide financial aid to the employee who remains away from work. In addition, the payment also does not typify as consideration for work or remuneration due to the employment contract, and the exercise of any remunerated activity by the employee during the maternity leave extension is prohibited (article 4 of Law 11770/2008).

Consequently, the understanding established by the Federal Supreme Court in the judgment of Extraordinary Appeal No. 576.967/PR (Topic No. 72 of the General Repercussion), in our view, can be used as an argument to maintain that the social security contribution should also not be levied on the payment of maternity leave extension.

Considering that the stance of the Brazilian Federal Revenue Service confirmed in Ruling No. 27/2023 of the General Taxation Coordination binds the Tax Auditors of the Federal Revenue Service, the social security contribution on the payment of maternity leave extension will be required; however, in our opinion, such charge is undue, and it will be possible to file a lawsuit aiming at its cancellation.

The Brazilian Patent and Trademark Office's Contracts' Department new deliberation on recordation procedures for Technology Transfer Agreements

Clarisse De La Cerda
Partner
clarisse.delacerda@bhering.adv.br

Bhering Advogados*
Av. Dr. Cardoso de Melo, 900
9º andar - 04548-003
São Paulo - SP/Brasil
T (+55) 11 5505 1191
F (+55) 11 5505 1295
www.bheringadvogados.com.br

The Brazilian Patent and Trademark Office (BPTO)'s Contracts' Department ended 2022 with new understandings adopted in the meeting of December 28, 2022, for recordation procedures of Technology Transfer Agreements, as per the publication in Official Gazette No. 2716, of January 14, 2023.

This flexibilization follows the coming into force of Federal Law No. 14,286/21, which removed the mandatory registration of technology transfer agreements for the purposes of foreign remittance of royalty payments. However, registration remained necessary for tax deductibility purposes.

All of these measures reflect that Brazil is a country open to innovation and technological development, removing unnecessary barriers to international transactions and the free flow of intellectual property assets.

One of these new understandings adopted in the meeting of December 2022 is in connection with the registration of trademark license agreements involving trademark applications. Although trademark applications were not prohibited from being licensed, the BPTO adopted a very restrictive position and would only allow for payment for these applications if and once they matured into registrations, provided the update of the certificate of registration for the agreement.

However, trademark applications are intangible assets with economic value and legal protection is guaranteed pursuant to articles 130 and 195, item III of Law No. 9,279/96. Hence, the owner of trademark applications is entitled to license them subject to a resolutive condition, in case the application is rejected and further shelved by the BPTO. Thus, the initial term declared in the certificate of registration must be the date declared in the licensing contract (and not a further date dependent upon the granting of registration). The BPTO already implemented this decision.

Other formalities which affected the recordation procedure, making it more onerous and time demanding, were also revised. For example, in cases of agreements signed electronically, the apostille or consular legalization requirement will no longer be necessary. In other cases, the need for an apostille or legalization will remain necessary. Also, the BPTO's Specialized Federal Attorney issued an opinion attesting for the feasibility of accepting other means of proving the authorship and integrity of documents signed electronically, even if using certificates issued by other entities, in the form of article 10, of the Provisional Measure n 2.200-2/2001.

Bhering Advogados*
Av. Dr. Cardoso de Melo, 900
9º andar - 04548-003
São Paulo - SP/Brasil
T (+55) 11 5505 1191
F (+55) 11 5505 1295
www.bheringadvogados.com.br

Moreover, the requirement that all parties insert their initials in all pages of the agreement and annexes will be removed. However, the requesting party will need to attach a statement by the attorney in charge of the recordation process attesting to the veracity of the information and documents presented, under the penalties of the law.

According to Resolution No. 199/2017, which is still in effect, all agreements signed in Brazil are mandated to have two witnesses signing the agreement. This was a requirement much criticized, as the Brazilian legal system does not impose the obligation of signature by two witnesses on private contracts. Article 784, item III, of the Brazilian Civil Procedure Code is not mandatory on the parties, but, instead, allows for the parties to have two witnesses signing the agreement to give enforceability to extrajudicial titles. The Brazilian PTO also decided to implement the removal of this mandatory requirement immediately.

The referenced meeting also decided on the removal of the need to present the bylaws or articles of incorporation of the Brazilian legal entity signing the agreement. The Brazilian PTO also compromised to update its filing systems so that the upload of such document is no longer necessary.

Another decision which was much anticipated and of high impact is the one with respect to the acceptance of licensing of agreements encompassing non-patented technology (i.e. licensing of know-how). In Opinion No. 00031/2021/CGPI/PFE-INPI/PGF/AGU, of the Specialized Federal Attorney of the Brazilian PTO, the possibility of licensing non-patented technology was acknowledged as a legal atypical contract.

The non-acceptance of know-how licenses was a great obstacle to many companies as the prior understanding deemed that only transfer of know-how was possible. This meant that, once the term of the agreement was reached, technology was effectively transferred to licensee. Hence, licensee would be able to freely explore the technology and restrictions on use or confidentiality obligations were excessive to that purpose. The prior understanding compromised business deals in which the intellectual property was solely protected under the trade secret regimen. It is expected that technological development will experience growth with the adoption of this measure.

Despite the above, it remains necessary that the BPTO revises its Resolution n. 199/2017 to incorporate the new changes, facilitating access and transparency to the understandings adopted in the mentioned deliberation of December 2022.

*Author of the publication ***So geht's e-Commerce in Brasilien***

Brazilian Data Protection Authority Penalties Now In Place

Aline Fidelis
Partner
afidelis@mayerbrown.com

Cristiane Manzueto
Partner
cmanzueto@mayerbrown.com

Tauil & Chequer Advogados
Associado a Mayer Brown
Av. Pres. Juscelino Kubitschek, 1455 - 5º e 6º andares
Vila Olímpia, São Paulo - SP, 04543-011
T (+55) 11 2504 4210
www.tauilchequer.com.br

The Brazilian Data Protection Authority (ANPD) approved the Regulation on Dosimetry and Application of Administrative Sanctions, which determines the methodology for the application of sanctions provided for in Law No. 13,709/2018 ("LGPD") – as a result, as of February 27, 2022, said sanctions now apply.

Infractions will be increased in three levels, as briefly detailed below:

- **Mild:**

Established by elimination, that is, when the elements of average and severe offenses are not present.

- **Average:**

Characterized when the infringement **significantly affects the interests and fundamental rights of the data subjects**. This occurs, for example, when the processing activity may prevent the exercise of rights or the use of a service, and/or cause material or moral damage to the data subjects.

- **Severe:**

When the infraction constitutes obstruction to the inspection activity or when an average infraction involves any of the following conditions:

a. processing personal data on a large scale (significant number of data sub jects or personal data involved, long duration or high frequency, or significant geographical span)

b. the offender receiving, or intended to receive, an economic advantage as a result of the infraction committed;

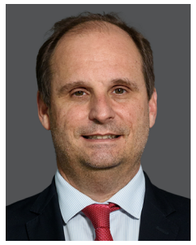
c. risking the life or physical health of the data subjects;

d. processing of sensitive data or personal data of children and adolescents and/or the elderly;

e. personal data processing not supported by one of the legal bases provided for in the LGPD;

f. unlawful or abusive discriminatory treatment; or

g. the systematic adoption of irregular practices.



Flávio Amaral
Partner
famaral@mayerbrown.com

Henrique Rocha
Partner
hrocha@mayerbrown.com

Tauil & Chequer Advogados
Associado a Mayer Brown
Av. Pres. Juscelino Kubitschek,
1455 - 5º e 6º andares
Vila Olímpia, São Paulo - SP,
04543-011
T (+55) 11 2504 4210
www.tauilchequer.com.br

TAUIL | CHEQUER
MAYER | BROWN

h. Based on the determination of the severity of the violation, the ANPD will determine the applicable administrative sanctions:

The Regulation also details how the simple fine will be calculated. The methodology involves:

Warning	Applicable when the infraction is mild or average and does not characterize a specific recurrence or when there is a need to impose corrective measures.
Daily Fine	Applicable to: i. ensure compliance with a non-monetary sanction or other determination by the ANPD; or ii. when, after being notified, the violator fails to remedy the violations, obstructs the inspection activities or commits a permanent infraction.
Simple Fine	Applicable when: i. the violator has not responded in a timely manner to preventive or corrective measures; ii. the infraction is classified as severe; or iii. it is not possible or appropriate to impose another sanction, due to the nature of the offense, the processing activity or the personal data, and in view of the circumstances of the case.
Partial suspension of the operation of the database that is the subject of the breach. Suspension of data processing activity.	Considering public interest, the impact on the rights of the data subjects, the classification and the complexity for regulating the processing activity in question.
Publicizing the infringement. Blocking or deletion of personal data.	The Regulation does not state when these sanctions would be applied, indicating only that ANPD will consider the relevance and the public interest involved.
Partial or complete prohibition of exercising activities related to data processing.	Applicable in cases where: i. there is a recurrence of an infraction punished with partial suspension of the operation of the database or suspension of the exercise of the activity of processing of personal data; ii. personal data is processed for unlawful purposes or without the support of a legal hypothesis; or iii. the offender loses or does not meet the technical and operational conditions to maintain the adequate processing of personal data.

A. Classifying the infraction as mild, average or severe, as detailed above.

B. Gauging the percentage of turnover, if the offender is a legal entity with revenue. For those legal entities with no revenue in the last fiscal year, a different method of calculation is used.

C. Determining the degree of damage. The ANPD has published a table describing the possible grades, each with a multiplication factor for the fine. The criteria to determine the degree is detailed in the Resolution, ranging from **0**, when the infraction does not cause damage or only causes negligible damage to the data subjects, to **3**, characterized when (i) the violation causes injury or offense to diffuse, collective or individual rights or interests, which have an irreversible or difficult to reverse impact on the data subjects, or (ii) there are damages resulting from bad faith litigation, including impediment to the ANPD's performance.

D) Calculation of the base fine. The base rate is calculated based on the following formula:

$$\text{Base rate} = \frac{(A2 - A1)}{3} \times \text{Degree of Damage} + A1$$

In this sense, the base value of the fine, to which aggravating and mitigating factors will be applied, is verified from the following calculation:

Base fine = Base rate x (revenue – taxes)

E) Analyze aggravating and/or mitigating factors. The Regulation determines an increase or reduction percentage for several listed situations, which can be calculated by adding or subtracting the percentages.

Mauro Pedroso Gonçalves
Partner
mpedroso@mayerbrown.com

Tauil & Chequer Advogados
Associado a Mayer Brown
Av. Pres. Juscelino Kubitschek,
1455 - 5º e 6º andares
Vila Olímpia, São Paulo - SP,
04543-011
T (+55) 11 2504 4210
www.tauilchequer.com.br

TAUIL | CHEQUER
MAYER | BROWN

Tauil & Chequer Advogados
Associado a Mayer Brown
Av. Pres. Juscelino Kubitschek,
1455 - 5º e 6º andares
Vila Olímpia, São Paulo - SP,
04543-011
T (+55) 11 2504 4210
www.tauilchequer.com.br

TAUIL | CHEQUER
MAYER | BROWN

Aggravating factors include recurrence of infractions and non-compliance with corrective actions, while mitigating factors include voluntary termination of the infringement and voluntary implementation of measures to reverse or mitigate the effects of the violation.

By the factors chosen, it is clear that maintaining a data protection governance program is relevant and significant for the ANPD, and is a mitigating factor in the fines.

F) Determine the final value.

The final amount of the fine will be determined as follows:

Value of the fine = Base fine x (1 + sum of aggravating factors - sum of mitigating factors)

The Regulation also stipulates that the amount of the simple fine cannot be less than double the advantage obtained or intended, when possible to estimate.

In addition, it also cannot be less than R$3,000 for mild infractions, R$6,000 for average infractions, and R$12,000 for severe infractions.

Given the above, it is clear that compliance with the LGPD and the ANPD regulations, besides being a matter of good business practice and ethics, is a legal necessity for any entity that wants to conduct business with personal data in Brazil.

It is essential, therefore, that privacy governance programs be implemented and continually reviewed and updated, with, for example, the mapping of how personal data is processed, the implementation of policies and processes aimed at responding to information security incidents, and the performance of impact reports, among other various controls and measures.

We will always keep our customers and partners up to date on the data protection legal and regulatory landscape in Brazil.

Will the creditors' alternative plan change the dynamics in a Brazilian judicial reorganization proceeding?

The filing of a judicial reorganization plan by creditors – also known as "alternative plan" - is one of the most pressing them regarding the resolution of conflicts in the restructuring of companies in crisis under a judicial reorganization proceeding in Brazil.

Considering that the alternative plan was introduced in the Brazilian legal system by the enactment of Law 14,112/2020, which amended the Brazilian Bankruptcy Law ("BBL"), effective from 2021, there is no previous history of the use of such a mechanism in our courts. Since its recent introduction, the use of the alternative plan has been reported in only one pending case of judicial reorganization in the Brazilian courts, in which creditors have presented the plan based on the amended BBL.

The possibility of filing an alternative plan, a practice adopted and accepted in several jurisdictions other than Brazil, has long been a demand from creditors and investors. The alternative plan was introduced into the legal system as an alternative option to the decree of forced liquidation of the company in the case of rejection of the debtor's reorganization plan by creditors. The alternative plan, therefore, avoids the loss of the company's going concern and provides an opportunity for an agreed solution for the company's preservation.

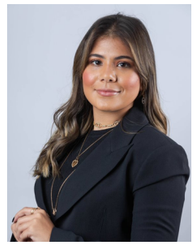
Proposing an alternative plan may certainly change the dynamics of negotiations between creditors and debtors under a judicial reorganization proceeding. Prior to this mechanism, the debtor company had the exclusive power and discretion to present a plan proposal and to accept or not, the changes proposed by its creditors, while the creditors only had the power to suggest such changes and vote on the reorganization plan that is presented by the debtor in the general creditors meeting for voting.

In view of the amendments provided by Law 14,112/2020, creditors now have the power to present an alternative plan to reorganize the debtor company, which , if confirmed, will be binding on the debtor as if the debtor had presented it.

In approving the amendment to the law, lawmakers faced the debtor's monopoly on the imposition of his proposed plan in the judicial reorganization proceeding. With this legal insertion, the legislator sought to provide a new balance to the negotiations between debtors and creditors during the judicial reorganization proceeding.

Bernardo Carneiro
Partner
Bernardo.carneiro@lefosse.com
T (+55) 11 3025 3334

José Luis de Rosa
Partner
Joseluis.rosa@lefosse.com
T (+55) 11 3025 3342



Nathalia Boucinhas
Associate
Nathalia.Boucinhas@lefosse.com
T (+55) 11 3024 6484

Lefosse
R. Tabapuã, 1227 – 14th floor
04533-014 São Paulo – SP
Av. Pres. Wilson, 231 office 2703
20030-905 Rio de Janeiro – RJ
T (+55) 11 3024 6100
www.lefosse.com

Lefosse

Although the law has brought an welcome opportunity to creditors to strengthen their position against the discretion and opportunistic behavior of the debtor, some issues in connection with the actual use of new mechanism need to be addressed.

Among those, the following stand out: (i) the 30-day period for presenting the alternative plan, which is half the legal period granted for the debtor to present an original plan proposal; and (ii) the provision that the alternative plan will only be submitted for voting if all its requirements are met cumulatively, thereby imposing prior control by the bankruptcy court.

In addition, it must be taken into account that even if bankruptcy courts deem the requirements for filing an alternative to have been met, other creditors or the debtor may file an interlocutory appeal against the decision or that if bankruptcy court consider the requirements where not met and issues a bankruptcy decree, an appeal may be filed by creditors and the debtor , which will take months to years to be resolved in the courts, halting the creditors meeting to vote on the alternative plan imposing significant risks to the reorganization proceeding and the implementation of any measures provided for in the alternative plan, such as DIP Loans, investments and others.

The main requirements of the alternative plan are as follows: (i) the alternative plan may not impose new obligations on the debtor's shareholders; (ii) the plan may impose a greater burden to the company and its shareholders than that which would result from the liquidation of assets of the debtor company in a forced liquidation proceeding; (iii) personal guarantees provided by individuals in relation to credits to be renewed under the reorganization plan which are owned by the creditors who presented who voted in favor of the alternative plan need to be released.

The requirements for the voting of the alternative plan, set forth above, themselves pose important questions, as well. Some of the requirements are straightforward and easy to determine if they are complied with, but others are not, and will demand complex task of valuating assets for a judicial sale, which changes over time and is subject to prevailing market conditions. How courts will address those issues in a consistent manner and provide guidance to questions such as (i) limits of control of legality by the judiciary over the alternative plan, especially with regards to the economic aspects related to the requirements of the alternative plan; (ii) whether failure to meet the legal requirements of the alternative plan will result in the debtor's immediate forced liquidation and (iii)) in the case of more than one alternative plan, how the plan's voting procedure will be carried out

Likewise, how courts deal with the effects of the appeals for the judicial reorganization proceeding in a timely manner will be crucial if the alternative plans are to be employed, and clarity on issues such as priority given to appeals in judicial reorganization and the consequence of appeals are essential in this regard.

Case law, therefore, would provide a great service to the practice of alternative plans by favoring objective, consistent and agile procedures and criteria that would enable plans to be approved expeditiously and with limited reversal possibilities.

Responding to the question in the title of this article, the ideal scenario is that the Brazilian law encourages the parties to an amicable settlement, but the mechanism of the alternative plan will only produce effects if its use is not made unreasonably difficult and risky by the time lapse for deciding the appeals and the lack of straightforward valuation criteria of the assets. The alternative plan cannot be a dog that barks but does not bite.

Lefosse
R. Tabapuã, 1227 – 14th floor
04533-014 São Paulo – SP
Av. Pres. Wilson, 231 office 2703
20030-905 Rio de Janeiro – RJ
T (+55) 11 3024 6100
www.lefosse.com

Lefosse

Philipp Klose-Morero
Managing Partner
Rödl & Partner South America
philipp.klose-morero@roedl.com
T (+55) 11 5094 6060 Ext. 1010

Arife Erkan
Associate Partner
Rödl & Partner South America
arife.erkan@roedl.com
T (+55) 11 5094 6060 Ext. 1290

Rödl & Partner
Rua Verbo Divino, 1488
Sala 3A, 3º andar
Chácara Santo Antônio (Zona Sul),
São Paulo - SP, 04719-002
T (+55) 11 5094 6060
www.roedl.de/brasilien

Rödl & Partner

The new German Supply Chain Act (LkSG): Due Diligence obligations for German companies, but also for Brazilian suppliers and business partners

I. German Supply Chain Act

The new German Supply Chain Due Diligence Act (German: Lieferkettensorgfaltspflichtengesetz, short: "LkSG"), imposes extensive new obligations on companies with regard to human rights along the supply chain. The LkSG has been in force since January 1, 2023. In the following we will highlight the main points of the new law and also briefly address implications for Brazilian suppliers as well.

1. Personal scope of application

The LkSG applies directly to all German companies, regardless of their legal form, headquarters, principal place of business or registered office. The relevant thresholds are based exclusively on the number of employees:

- From January 1, 2023: Companies with at least 3,000 employees; and
- From January 1, 2024: Companies with at least 1,000 employees.

Please note that the LkSG also applies to German subsidiaries of Brazilian companies, if the subsidiary exceeds the above-mentioned thresholds and has its registered office in Germany.

2. Coverage

The Due Diligence obligations of the companies basically cover the entire supply chain - from the raw material to the finished sales product, which means:

- In addition to its own business operations, the business relationships and production methods of its direct suppliers must also be considered.
- In the case of indirect suppliers, a company must take action if there are actual indications that a violation of a human rights or environmental obligation is possible.

The requirements placed on companies are graduated, in particular according to their ability to influence the perpetrator of the human rights violation and the different stages in the supply chain.

3. Duty of care

Internationally fundamental human rights standards are to be protected by the LkSG. If environmental risks lead to human rights violations (e.g. through poisoned water), air and water pollution as well as the use of chemicals and pesticides or illegal deforestation are also included.

4. Due Diligence obligations

According to Section 3 of the LkSG, companies are required to conduct appropriate human rights and environmental Due Diligence in their supply chain with the aim of preventing or minimizing human rights or environmental risks; or ending the violation of human rights or environmental obligations.

The Due Diligence obligations include:

- Section 4 (1) LkSG – Risk Management: The company must establish an appropriate and effective risk management system which must be embedded in all relevant business processes through appropriate measures.
- Section 4 (3) LkSG – Human Rights Officer: The company must define who within the company is responsible for monitoring the risk management. The management shall regularly, at least once a year, inform itself about the work of the responsible person.
- Section 5 LkSG – Risk analysis: The company shall conduct an appropriate risk analysis to identify the human rights and environmental risks in its own business operations and those of its direct suppliers. The risk analysis must be carried out once a year as well as on an ad hoc basis if the company must expect a significantly changed or expanded risk situation in the supply chain, for example due to the introduction of new products, projects or a new business field.
- Section 6 LkSG – Preventive measures: If a company identifies a risk as part of a risk analysis in accordance with Section 5, it shall immediately take appropriate preventive measures within the company's own business area and vis-à-vis direct suppliers.
- Section 7 LkSG – Remedial action: If the company discovers that the violation of a human rights-related or an environmental obligation has already occurred or is imminent in its own business area or at a direct supplier, it shall immediately take appropriate remedial action to prevent or end this violation or to minimize the extent of the violation.
- Section 8 LkSG – Complaints procedure: The company must ensure that an appropriate internal complaints procedure is in place. The complaints procedure enables persons to point out human rights and environmental risks as well as violation of duty that have arisen as a result of the economic actions of a company in its own business area or of a direct supplier. Section 9 LkSG provides for Due Diligence measures with regard to indirect suppliers.

Rödl & Partner
Rua Verbo Divino, 1488
Sala 3A, 3º andar
Chácara Santo Antônio (Zona Sul),
São Paulo - SP, 04719-002
T (+55) 11 5094 6060
www.roedl.de/brasilien

Rödl & Partner

- Section 10 (1) LkSG – Documentation: The fulfillment of the Due Diligence obligations pursuant to Section 3 LkSG shall be documented on an ongoing basis within the company. The documentation shall be kept for at least seven years from its creation.
- Section 10 (2) LkSG – Reporting measures: The company shall prepare an annual report on the fulfillment of its Due Diligence obligations in the previous financial year and make it publicly available free of charge on the company's website for a period of seven years.

5. External control and sanctions

The LkSG provides for external inspection of fulfillment of the Due Diligence obligations by the Federal Office of Economics and Export Control (German: Bundesamt für Wirtschaft und Ausfuhrkontrolle, short: "BAFA"):

- Accordingly, inspections of companies based on the annual reporting procedure are carried out.
- Fines are possible for violations of the law. Companies can also be excluded from public procurement for up to three years in the event of serious violations.

II. European Corporate Sustainability Due Diligence Directive

In the same direction as the German LkSG, the European Commission presented on February 23, 2022 a draft proposal of the European Corporate Sustainability Due Diligence Directive ("CSDDD").

The Directive lays down rules on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship and on liability for violations of the obligations mentioned above.

1. Status

On November 7, 2022, the rapporteur of the European Parliament's Committee on Legal Affairs, Lara Wolters, published a Draft Report which in some cases included significant tightening compared to the Commission's proposal.

Less than a month after the publication of Lara Wolters' draft report, on December 1, 2022 the European Council formally adopted its negotiating position ("General Approach") on the CSDDD.

As soon as the European Parliament has also given its position (which is expected to happen by spring of this year), the so-called trilogue negotiations will be initiated. In 2024, the EU supply chain legislation could already be in place.

Depending on the implementation deadline agreed upon, the member states would then have 2 or 3 years to enact corresponding national supply chain laws or adapt existing laws.

Differences with the LkSG

The scope of application of the CSDDD goes significantly beyond that of the LkSG and requires, among other things, that the entire supply chain be covered, as well as users and disposers of products, not just direct suppliers as in the LkSG. The CSDDD is also to apply to companies with 500 or more employees (or 250 or more in high-risk sectors) and not just 1,000. The new EU regulation will possibly include civil liability for companies, allowing affected parties to sue for damages in European courts. Furthermore, the EU is also working on an expansion of Due Diligence requirements.

III. Suppliers and Business Partners

The new LkSG creates an urgent need for action for the obligated companies. They must implement the above-mentioned requirements in their compliance systems or make corresponding internal adjustments to ensure compliance with human rights in their supply chains.

However, the LkSG does not only entail Due Diligence obligations for companies covered by the scope. Even if only indirectly, small and medium-sized enterprises must also comply with the requirements of the LkSG. They are also bound by the Due Diligence obligations as potential suppliers or business partners of directly affected companies, since the mainly affected companies must audit their entire supply chain (and this precisely includes suppliers). In the future, particular attention will be given to suppliers from high impact industries such as food, textile and agriculture, which is why local Brazilian suppliers in particular should also address the requirements of the law to ensure their future business relationship with the large German companies. These suppliers and business partners of affected German companies will have to fill out questionnaires or expert reports from their principals in which they must assure that they do not work with any companies that violate human rights.

We have assembled an international and interdisciplinary team of experts to support companies subject to the LkSG worldwide (at the parent company and international subsidiaries) in implementing the requirements, and also to conduct selective risk-based audits of suppliers.

On the other hand, we also support the suppliers themselves in their voluntary review of compliance with the law (from a German and Brazilian legal perspective).

Rödl & Partner
Rua Verbo Divino, 1488
Sala 3A, 3º andar
Chácara Santo Antônio (Zona Sul),
São Paulo - SP, 04719-002
T (+55) 11 5094 6060
www.roedl.de/brasilien

Rödl & Partner

Patrícia Giacomin Pádua
Partner in the Tax Area – São Paulo
patricia.padua@stussinevessp.com.br

Stüssi-Neves Advogados*
Rua Henrique Monteiro, 90 -
10º andar
05423-020 - São Paulo - SP/Brasil
T (+55) 11 3093 6612
F (+55) 11 3097 9130
www.stussi-neves.com

Stüssi-Neves Advogados

Advances in regulation of tax settlements

PGFN/RFB Joint Ordinance no. 1/2023:

"Tax Litigation Reduction Programme (PRLF)"

The tax settlement as a mechanism to regularize the situation of a taxpayer as a debtor through an agreement with the government has advanced rapidly in recent years. Although provided for in the National Tax Code since 1966, it was only in 2020 that Law 13988/2020, amended by Law 1475/2022, established conditions for this mechanism, which is now widely regulated at the federal level by both the Office of the Attorney-General of the National Treasury (PGFN) and the Brazilian Federal Revenue Service (RFB).

The PGFN issued Ordinance no. 6757/2022 (amended by Ordinances 6941/2022 and 10826/2022) and the RFB Ordinance no. 208/2022 (revoked by Ordinance no. 247/2022), defining different procedures for the settlement of tax debts, either by adhering to the Government's own proposal, as set out in a duly published notice to the public, or individually, through an offer made by the Government or by the debtor itself, in this case formalized directly through a digital platform.

The notices containing the conditions for adhesion settlements have been published in recent years for specific cases. In relation to debts administered by the RFB, there are currently in force adhesion settlements of tax debts constituted spontaneously and considered irrecoverable (**notice no. 01/2022**) and those of small value in tax administrative litigation, up to 60 minimum salaries on the adhesion date, related to individuals, micro companies and small companies (**notice no. 02/2022**). Amendment no. 01, of November 29, 2022, to the notices of settlement listed, **extended the deadlines for adhesion to said settlements until March 31, 2023**.

Regarding the PGFN debts, the settlement by adhesion of small value debts is in force, pursuant to the Tax Litigation Reduction Programme (PRLF), which will be addressed below, with **adhesion until March 31, 2023 through the REGULARIZE system**. The new **PGDAU Notice no. 02/2023**, in turn, provides for different types of adhesion settlement: debts of individuals, individual microentrepreneurs, microenterprises and small-sized companies listed as overdue liabilities for more than a year, in the consolidated amount equal to or less than 60 minimum salaries; debts assessed as difficult to recover or irrecoverable, in an amount not exceeding R$ 50 million; debts listed as overdue liabilities secured by guarantee insurance or a letter of guarantee; and debts in which the debtor's ability to pay is considered. The options are fully regulated, and **adhesion is possible until May 31, 2023**.

After this brief overview of the transactions currently in effect under the adhesion system, we will now highlight the PGFN/RFB Joint Ordinance no. 1/2023, which instituted the "Tax Litigation Reduction Programme (PRLF)" with conditions for the making of **exceptional settlements**. The debts that can be included in the programme are those under discussion in administrative tax litigation with appeals pending judgment, either in the Federal Revenue Judgment Offices (DRJ) or in the Administrative Council of Tax Appeals (CARF), and of small value in administrative litigation or entered as overdue federal tax liabilities.

Besides the adhesion request, the taxpayer must submit proof of payment of the initial instalment and, if applicable, professional certification of the existence and regular entry in its books of the credits resulting from tax losses and the negative calculation basis of CSLL.

In relation to tax debts with appeals pending judgment by the DRJ or CARF, with the intention of using tax losses, the programme envisages two types of settlement depending on the degree of recoverability of the debts: in the case of debts classified as irrecoverable or difficult to recover, there is provision for a reduction of up to 100% of the value of interest and penalties, subject to the limit of 65% of the total value of each debt subject to negotiation, with a down payment of 30% in cash, in up to 9 monthly instalments, and the remaining balance (70%) with credits arising from tax losses and negative calculation basis of CSLL assessed up to December 31, 2021; and in the case of debts classified as having a high or medium prospect of recovery, there is no discount, and the payment condition is a down payment of 48% in cash, in up to 9 monthly instalments, and the remaining balance (52%) with credits deriving from tax losses and the negative calculation basis of the CSLL assessed up to December 31, 2021.

It is possible to use the balances of tax losses and the negative calculation basis of CSLL belonging not only to the taxpayer or person jointly liable for the debt, but also those held by the parent company or subsidiary, directly or indirectly, or further, by companies that are directly or indirectly controlled by the same legal entity, provided that the relationship was consolidated by December 31, 2021 and remains unaltered up to the adhesion date. The use of tax loss credits and of the negative basis of CSLL extinguishes the debts subject to the condition that they are subsequently ratified. If the use of the tax loss and CSLL negative base is denied, the taxpayer will have 30 days to pay in cash the outstanding balance or file an objection.

If there is no intention of using tax losses and negative calculation basis of CSLL, the tax debts with an appeal pending judgment before the DRJ or CARF may be negotiated with a reduction of up to 100% of the interest and penalties,

Stüssi-Neves Advogados*
Rua Henrique Monteiro, 90 -
10º andar
05423-020 - São Paulo - SP/Brasil
T (+55) 11 3093 6612
F (+55) 11 3097 9130
www.stussi-neves.com

Stüssi-Neves Advogados

Stüssi-Neves Advogados*
Rua Henrique Monteiro, 90 -
10º andar
05423-020 - São Paulo - SP/Brasil
T (+55) 11 3093 6612
F (+55) 11 3097 9130
www.stussi-neves.com

Stüssi-Neves
Advogados

subject to the limit of 65% of the total of each debt negotiated, by making a down payment of 4% of the consolidated amount, in cash, in up to 4 successive monthly instalments, and the remaining balance in up to 2 instalments as down payment; or with a reduction of up to 100% of the interest and penalties, subject to the limit of 50% of the total amount of each debt negotiated, with a down payment of 4% of the consolidated amount, in cash, in up to 4 successive monthly instalments, and the remaining balance in up to 8 instalments.

Whichever method is used, the effective discount percentage will take into account the taxpayer's ability to pay.

In relation to Small Claims Tax Debts (up to 60 minimum salaries), if related to individuals, micro companies or small companies, regardless of classification of the debt and the ability to pay, there is provision for a 50% reduction, including the principal, if payment is made in 2 months; or for a 40% reduction, including the principal, if payment is made in 8 months. In this case, payment must be made with a down payment of 4% in cash, in up to 4 instalments, and the balance paid in accordance with the reduction applicable. Adhesion must be made through the REGULARIZE system of the Office of the Attorney-General of the National Treasury.

Adhesion to the "Tax Litigation Reduction Programme (PRLF)" may be made from 8 a.m. on February 1, 2023 to 7 p.m. on March 31, 2023 through the e-CAC Portal. It should be noted that formalization of the agreement constitutes an unequivocal act of acknowledgement by the taxpayer of the debts settled and implies extinction of the relevant administrative litigation.

The PRLF can be an opportunity for companies to evaluate their ongoing administrative proceedings and, if eligible, to consider the prospects for success and, if they so wish, to adhere to the new settlement with the expected benefits.

After this brief overview of the relevant changes recently made in the regulation of tax settlements, we may conclude that it is a mechanism that has become a permanent part of the tax system, making it possible not only to extinguish the obligation through mutual concessions, but also to resolve disputes that negatively impact both the receipt of the debt by the government and the full exercise of its activities by the taxpayer.

*Author of the publication ***So geht's Arbeitsrecht in Brasilien and So Geht's Ihr Einstieg in Brasilien***

Deutsch-Brasilianische Industrie- und Handelskammer São Paulo

Rua Verbo Divino, 1488 - 3º andar
04719-904 São Paulo - SP - Brasilien
T (0055 11) 5187-5216
F (0055 11) 5181-7013
E juridico@ahkbrasil.com

www.ahkbrasil.com