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The effects of the decision of the Federal Supreme Court on res judicata in the tax area

As widely reported, the Federal Supreme Court (STF) in a judgment concluded on February 8, 2023 ruled in summary that final court decisions favourable to the taxpayer determining the non-payment of a tax demanded on a continuous basis, i.e. with periodic payments, become ineffective should there be a change in the Supreme Court's position.

The recent decision, involving the analysis of two extraordinary appeals, RE 955227 (Topic 885) and RE 949297 (Topic 881), has led to the need for companies to confirm the possible effects on their financial statements, not least because the CVM (Brazilian Securities and Exchange Commission), with rulings approved by the CFC (Federal Accounting Council), has set guidelines determining the registration of all tax issues that could be included in the judgment (Circular Letter/CVM/SNC/SEP/no. 01/23).

It is important to note that the decision of February 8, 2023 dealt with the Social Contribution on Net Profits (CSLL), the constitutionality of which was first discussed in the 1990s, with final and unappealable decisions recognizing the unconstitutionality of the law that instituted the CSLL, payment of which could therefore not be demanded (Law 7.689/88). In 2007, however, the STF in Action for Declaration of Unconstitutionality no. 15, declared that the charge was constitutional. The opinion now expressed by the Justices of the STF is that the CSLL has therefore been constitutional since 2007, and as a result, it has been payable since then and provision should have been made even by companies with a final and unappealable decision in their favour. However, considering that in Brazil there has never been a similar situation in which the doctrine of res judicata has been questioned, and considering that a financial provision is synonymous with the expectation of loss, no provision was made for the amounts payable by most of the companies that benefitted from the original favourable decision.

If the effects of the decision of February 8, 2023 are not modified to the effect that the new position of the STF applies only to the future and not to the past, which is still a possibility as the result of a new request for modification submitted in Embargos de Declaração (motion for clarification), the CSLL will in fact be due by taxpayers that benefitted from favourable decisions as from 2007. There is still a discussion as to whether CSLL could be demanded only in relation to the last five years not affected by the statute of limitations, or whether it could be

demanded since 2007, which is not the position most widely accepted. There are also companies whose unpaid contributions have been the subject of tax assessment notices, which must also be considered.

Although the decision dealt specifically with CSLL, the principle applies to all final decisions that suspended the payment of continuous taxes and the results of which were reversed by the STF. We are aware that certain arguments have been the focus of attention by companies. We may list the following:

(i) Certain claims for exclusion of ICMS from PIS and COFINS tax base filed after March 2017 (Topic 69).

Considering that on May 13, 2021 the STF decided that the exclusion of ICMS from the PIS and COFINS tax base is valid as of March 15, 2017, according to the principle established in the judgment of Extraordinary Appeal no. 574.706, under the general repercussion system (Topic 69), except for lawsuits and judicial and administrative proceedings filed up to this date, companies that filed suit after March 15, 2017 are not authorized to take advantage of previous credits, according to the position adopted by the STF.

It should be noted that numerous companies filed lawsuits after March 15, 2017 and were granted final and unappealable decisions recognizing the right to the credit in the 5 (five) years prior to the filing of the lawsuits. The PGFN (Office of Attorney General of the National Treasury) even filed numerous rescission actions to adjust the decisions to the STF's position. According to the STF ruling of February 8, 2023, however, regardless of the rescissions, the credits may only be used after March 15, 2017.

(ii) IPI on resale of imported products (Topic 906).

The Federal Supreme Court has confirmed the constitutionality of the IPI levy on the customs clearance of industrialized products and also on their removal from the importing establishment for sale in the domestic market. By majority vote, the Court dismissed Extraordinary Appeals nos. 979626 and 946648, judged together, in a judgment concluded on August 21, 2020. The general repercussion of RE 946648 was recognized (Theme 906).

The court, in accordance with the dissenting opinion of Justice Alexandre de Moraes, held that the levy of the tax at both stages does not represent double taxation and does not result in a violation of the principle of tax equality. The general repercussion argument was as follows: "The levy of the Tax on Manufactured Products (IPI) on customs clearance of manufactured goods and on their removal from the importing establishment for sale in the domestic market is constitutional".

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(iii) Social security contribution on 1/3 vacation bonus (Topic 985).

During the period from August 21 to August 28, 2020, in Virtual Plenary session, the STF settled its position on Topic 985, by majority vote, to the effect that "The levy of social security contribution on the amount paid as constitutional one-third vacation bonus is lawful". In other words, the employer's INSS contribution is levied on the 1/3 vacation bonus paid together with the employee's vacation pay.

Since March 2014, the Superior Court of Justice (STJ) had already established Binding Decision 479 to the contrary (that the 1/3 vacation bonus is of an indemnity nature and does not give rise to the payment of INSS). This decision was followed by the Regional Courts of Appeal. In 2016, the STF itself denied general repercussion to Topic 908, which addressed the levy of INSS on the employee's quota of the 1/3 vacation bonus, on the grounds that it was an infra-constitutional matter.

(iv) CSLL on exportation (Topic 8).

By six votes to five, the Federal Supreme Court (STF) decided on August 12, 2010, that the profit earned by exporting companies is subject to CSLL tax. The justices ruled that revenue is not profit. Therefore, the constitutional provision for immunity from the levy of contributions on revenue obtained from exports does not apply to CSLL. Justice Joaquim Barbosa cast the deciding vote.

By nine votes to two, the justices also ruled that the levy of contributions on the financial movement of these earnings is lawful. Only Justice Marco Aurélio and STF President Cezar Peluso voted against the charge of CPMF on revenue obtained from exports.

The argument that prevailed was that the taxpayer is not entitled to exclude from the CSLL and CPMF tax base the revenue arising from export transactions carried out since EC (Constitutional Amendment) 33/2001, because the tax base is the net profit, which is not to be confused with revenue. If the revenue derived from exports is exempt from contributions, this does not imply that the profit resulting from such revenue is also exempt, since revenue and profit are not the same.

(v) COFINS on the provision of legally regulated services (Topic 71).

Revocation of the exemption stipulated in art. 6, II, of Complementary Law 70/1991 by art. 56 of Law 9.430/1996 is lawful, since LC 70/1991 is only formally complementary, but ordinary in substance as regards the provisions concerning the social contribution it created. Thus, the exemption from payment by the civil companies

listed in Decree-Law no. 2.397/87 (such as "medical clinic", "law office", "accounting firm" etc.) is no longer applicable, according to the ruling of the STF.

These and other cases, in which there are taxpayers benefitting from favourable decisions, given the change in orientation by the STF, even if these decisions have not been the subject of rescission actions by the PGFN, according to the STF's ruling of February 8, 2023, may culminate in the demand for unpaid taxes based on the previous judicial decisions.

Our first recommendation is that each company should assess the past and current legal disputes it is involved in, in order to confirm initially if it is benefitting from them. If the assessment is positive, that is, if there is any benefit arising from a judicial decision, it should be confirmed whether there is any change of orientation in relation to this discussion. And, if so, what are the effects of this change in relation to the specific case.

It is certain that further discussions may be necessary in order to clarify to what extent the earlier final and unappealable decision will become ineffective due to the new position of the STF. It is important to note that until the STF changes its understanding on a certain matter, the favourable decision will continue to produce its regular effects. Furthermore, it must be borne in mind that the principles of non-retroactivity, as well as annual and 90-day anteriority must be observed, i.e. the new ruling of the STF can only come into force in the next fiscal year or, as in the case of contributions, after 90 (ninety) days.

It should also be mentioned that there is a possibility that the tax authorities will demand a penalty and interest for the late payment of taxes, although this may be questioned.

We take this opportunity to point out that we have the expertise and are available to assist any company that wishes to make the necessary assessment of the impact of the STF's decision of February 8, 2023 on its accounting and financial statements.

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Brazilian Supreme Court fixes the thesis of prevalence of conventions and collective bargaining agreements over legislation

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With the enactment of Law No. 13,467 of 2017, the so-called "Labor Reform", article 611-A of the Consolidation of Labor Laws has established that conventions and collective bargaining agreements have prevalence over legislation. In the same sense, the Federal Constitution of 1988 recognizes conventions and collective bargaining agreements as fundamental rights of workers (article 7, item XXVI of the Federal Constitution), thus legitimizing and stimulating collective bargaining.

However, despite the legislator's clear option to validate the normative force of conventions and collective bargaining agreements, the prevalence of collective instruments has always been the subject of debate in the Labor Courts, mainly with regard to the validity of clauses that reduce or restrict (partially or fully) the employees' rights.

In this context, due to the numerous decisions of the Labor Courts which, based on the analysis of the specific case, restricted or annulled clauses previously stipulated in collective instruments, the Brazilian Supreme Court, in the judgment of the Interlocutory Appeal nº 1,121,633, finally decided and established a thesis with general repercussion, through a judgment that became final on May 09, 2023, that conventions and collective bargaining agreements prevail over law, even if they limit or restrict labor rights, as long as they are not rights protected by the Federal Constitution.

Said legal thesis No. 1,046, in turn, was established with the following content: "the collective bargaining agreements and conventions are constitutional, where, by considering the negotiated sectoral suitability, they agree on limitations or removals of labor rights, no matter the specification of compensatory advantages, provided that it is respected the absolutely unavailable rights", i.e., certain rights that are irrevocable or inalienable.

In the judgment, the Brazilian Supreme Court also defined the limits of judicial intervention on collective labor instruments, by establishing three basic premises, which must be observed in the judicial review of conventions and collective bargaining agreements.

- The first fundamental premise establishes the inapplicability of the protective principle or the principle of the primacy of reality in the interpretation of conventions and collective agreements. The reason for that is the fact that the collective bargaining observes its own procedure, defined by law and with mandatory participation of the union, and, as such, within the context of a collective bargaining, employers and employees, duly represented by their respective unions, are in a position of equivalence, and hence the collective autonomy cannot be replaced by the invocation of protective principles or the primacy of reality, since, in collective law, the asymmetry of power present in individual labor relations does not exist.

- The second fundamental premise provides that, in judicial intervention on collective norms, the Theory of Conglobation in Collective Labor Law must be applied, according to which, in the event of a conflict between the Collective Convention, the Collective Bargaining Agreement or any other normative instrument, the one that is most favorable to the employee shall prevail, as a whole or in its entirety. According to this theory, collective instruments result from mutual concessions, therefore, it would not only be unacceptable to partially annul a convention and collective bargaining agreement in detriment of one of the agreeing parties, but neither be examined individually, disregarding the whole of the adjusted considerations.

This second premise is extremely relevant, as there are many cases in which the Labor Court, in a clear position that discourages collective agreement, maintains the several benefits provided for in the instrument in favor of employees, but annuls clauses that impose them certain burdens and which would supposedly be "beneficial" only to the employer.

Furthermore, it is worth emphasizing that the agreement between employer and employees presupposes the existence of reciprocal concessions and abdications, so that a collective agreement is reached, for the benefit of both parties, which is either considered fully valid with all the costs and advantages arising therefrom, or is invalid and, in this case, cannot generate advantages or disadvantages for any of the parties.

- Moreover, the third and last fundamental premise for the judicial analysis of collective instruments is the understanding that the reduction or limitation of labor rights by collective norms must always respect absolutely unavailable rights. In this sense, the Brazilian Supreme Court established, as a rule, the wide availability of labor rights in collective norms, safeguarding the minimum civilizing level, which determines that the clauses of collective agreements or collective agreements cannot violate constitutional norms,

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treaty norms and international conventions incorporated into Brazilian law and norms that, even if they are infra-constitutional, ensure minimum guarantees of citizenship to employees.

Thus, it appears that the thesis recently established by the Brazilian Supreme Court, as well as the premises established for judicial intervention on collective work instruments are extremely relevant, since the Brazilian Supreme Court, by standardizing the understanding to be observed by all instances of the Judiciary, gave greater legal certainty to collective instruments, in addition to major autonomy in negotiation between employer and employees, and also freedom for the parties to actively participate in important decisions that affect labor relations.

As a consequence, the prevalence of collective agreements over the legislation is definitely established, which is why the Labor Courts are now expected to stop denying collective autonomy to deliberate on working conditions of a certain category and start to respect the model proposed by the Federal Constitution of 1988, which recognizes collective bargaining mechanisms as important conflict resolution instruments. This is because the annulment of collective agreements, customarily determined by the Labor Courts, whereas violating article 7, item XXVI, of the Federal Constitution, generated a clear disincentive to collective bargaining harmful to employment relations, since it is precisely through collective bargaining that better working conditions are established, which are rarely contemplated in labor legislation.

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ANPD Publishes Opinion Regarding Use Of Data In The Pharmaceutical Sector

The Brazilian Data Protection Authority (ANPD) published Opinion n. 4/2022/CGTP/ANPD ('Opinion'), shedding light onto a series of findings regarding the use of personal data in the pharmaceutical sector. Since 2020, ANPD had been monitoring the processing of personal data in pharmacies after several complaints, as according to many data subjects, an excessive collection of data was in place whose purpose was not clearly stated.

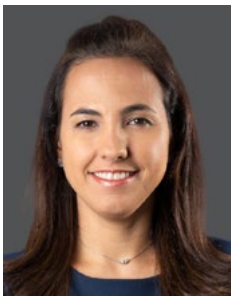
After a study conducted by the Brazilian General Coordination of Technology and Research (CGTP), it was found that some personal data processing practices were not yet in full compliance with the law, including the processing of personal data for purposes other than those indicated to the subjects, as well as indications of excessive personal data collection, including sensitive personal data, without clear information on how this data is processed.

The Opinion focused on some sensitive points in the sector, among which are loyalty and discount programs, in which sensitive data is gathered and disclosed to various agents. The Opinion also identified potential compliance flaws of certain agents in the sector, without, however, being in front of a proper investigative procedure.

On the other hand, the Opinion ended up revealing some of the ANPD's positions. First, ANPD will randomly evaluate privacy policies on the internet and expects to find information regarding legal bases, even though art. 9 of Brazil's General Data Protection Law (LGPD) does not require this. In addition, if personal data is collected in person, as is the case when registering in stores, privacy policies and notices should also be physically made available to data subjects, by the same means through which the data is collected.

The Opinion also indicates, as an ANPD recommendation, that when there is a discount program, loyalty program or something similar, it is important to have specific regulations published in an easily accessible source. This is due to the lack of transparency regarding data sharing with service providers and other business partners (e.g. as in the case of those responsible for loyalty programs, which create behavioral profiles of interactions with customers and which allow data subjects to accumulate and redeem points based on their purchases).

This point is not new, but it demonstrates what ANPD will analyze through its investigative procedures. From this standpoint, conditioning the sharing of personal data to obtain discounts in a loyalty/discount program may render any consent in-



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valid, mainly due to (i) lack of transparency as to the reason why the data subject is sharing their data at the time of purchase and (ii) lack of freely given consent.

Along these lines, the study conducted by CGTP, which provoked the ANPD's Opinion, concluded that there is a low maturity of data treatment agents in the pharmaceutical retail sector with regard to the protection of privacy and personal data. Thus, in light of several cases analyzed, it was found that information was not made available in a clear and straightforward way about the stages of data processing, such as the purpose or identification of the processing agents.

Therefore, this manner of data treatment has jeopardized the right to information of the data subjects, who find themselves unable to effectively exercise their rights and report possible irregularities in their treatment.

As a consequence of the lack of transparency and the scarce operationalization of the right of due access, listed in Article 9 of the LGPD, and the evident difficulty for the data subjects to oppose the processing of their personal data, much of it being sensitive, such as the collection of biometrics, for example.

From this perspective, the research identified biometrics as an extremely important emerging technology. Its impact is not only restricted to the commercial aspect, but also covers areas such as health services, migration control, fraud prevention and physical and logical access restriction to systems. Therefore, the evaluation of its compliance with the LGPD requires a broader analysis, considering its application in several sectors other than pharmaceuticals.

Moreover, it is necessary to consider other aspects related to privacy and data protection when using biometric information. This should be done in accordance with the principles established in Article 6 of the LGPD, such as purpose, appropriateness, necessity, and security. Considering the sensitivity of the data involved in the pharmaceutical sector, minimum security standards must also be adopted, both technical and administrative, to ensure the protection of the personal data processed.

In this sense, we can also infer from the Opinion that when collecting biometric data for identity validation purposes, if there are other less invasive and still safe means, one should always choose not to collect biometric data, in the wake of the necessity principle (minimization) present in art. 6, III of the LGPD.

Hence, it should be noted that there is an opportunity for an effective role of the ANPD from an educational standpoint, in order to promote the adoption of best practices in personal data protection, without neglecting its supervision

duties. This scenario would suggest that an educational approach, beyond the specific context of the groups studied, would have the potential to bring compliance to a larger number of commercial establishments.

In this context, it is important to note that the LGPD establishes the possibility of formulating rules of good governance practices which establish organizational conditions; operating rules; procedures, including complaints and petitions from data subjects; security standards; technical standards; specific obligations for those involved in the data processing; educational initiatives; risk mitigation mechanisms; and other aspects related to the processing of personal data (art.50, LGPD).

Although, in this scope, it should be noted that this Opinion does not presently have a binding character, especially with regard to the above considerations, but should still certainly serve as a guide of best practices for regulated entities.

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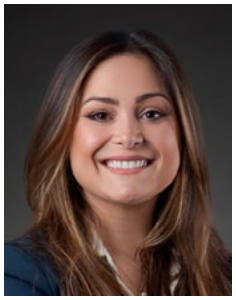

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Public Private Partnership for intercity train project in São Paulo brings opportunities for foreign investors

The construction and operation of the railway line that will connect the city of São Paulo to Campinas, a strategic city of about 1.2 million inhabitants, close to the industrial and commercial center of São Paulo, Intercity Train – Northern Axis (TIC), is bound to be one of the largest public-private partnership projects in Brazil.

The Government of the State of São Paulo will hold an international auction for the project on November 28, 2023, and the public notice with the rules for participation has already been published in the Official Gazette. With an estimated contract value of around US$ 2.5 billion, the project was structured by the Inter-American Development Bank (IDB) and has the potential of being of interest to foreign investors for various reasons.

The project aims to serve the macro metropolis of São Paulo, with almost 34 million inhabitants. It is estimated that the express service that will connect the cities of São Paulo and Campinas under a special train will serve, by means of a line 101 km long, about 65 thousand passengers daily until 2055. In addition, TIC will meet the demand for stopover services by means of an inter-metropolitan train and by means of Line 7 of the Companhia Paulista de Trens Metropolitanos (CPTM), with an estimated 650,000 passengers per day for stopover services.

The future concessionaire must perform the activities of construction, requalification, expansion, adequacy and modernization of the infrastructure of the lines and their constituent goods, as well as civil works, installation of permanent way, systems of energy, signalling, control, telecommunications and ancillary, aerial network, as well as the acquisition of railroad rolling stock and demands of environmental processes. Therefore, the Concessionaire may enter into contracts with suppliers of mentioned systems, of railroad rolling stock and other services.

The operative fleet of the current stopover service has 30 Hyundai Rotem 9,500 series trains, and new trains with similar characteristics must be acquired by the concessionaire to complement the fleet. Seven 8-car trains of the "open wide gangway" type with capacity for 2,600 passengers (16% seated) and a maximum speed of 100 km/h are to be acquired for the stopover service. For the express service, the Concessionaire must acquire 15 single-decker unit trains of 12 cars with 300 m and an approximate total capacity of 1,100 passengers seated per

train, or double-decker unit trains of 150 m, with an approximate capacity of 860 seated passengers, both types with an operational speed of 140 km/h.

As a condition for signing the contract, the winner of the auction must prove experience, by itself or through a subcontracted operator, in the operation of urban or metropolitan public passenger transportation, with light rail, metro or railway technology, for at least 12 consecutive months, with an average of at least 220,000 passengers per working day.

There has been an effort of the Government of the State of São Paulo to increase the incentives set forth in the public bidding notice to attract foreign investors. In particular, the formation of a consortium composed only by foreign companies is allowed, which is not common in Brazilian public-private partnership projects, and the economic-financial requirements contain accounting rules which are compatible with international standards.

Those interested in the project must demonstrate previous experience, by means of a technical capacity certificate, as responsible for the management/administration of infrastructure assets, for at least 12 months, with (i) a minimum investment of R$1,870,807,863.15, corresponding to 15% of the estimated value of the contract, and (ii) that has generated annual operating revenue of at least R$300 million. Since this is a requirement of experience with large investments, foreign investors have a great advantage in the competition.

It should also be noted that the contract for the project contains a rule that regulates the sharing of foreign currency risk assumed in financing instruments in foreign currencies signed in the first five years of the contract and applicable to the portions of debt service for investments in reversible assets, which also reinforces the government's commitment to foreign investors.

The project is being treated by the São Paulo State Government as a priority, signalizing that it will effectively be granted to the private initiative, with the potential of becoming a historical landmark for the interurban collective railroad transportation of passengers, which is still in a very early stage in the country.

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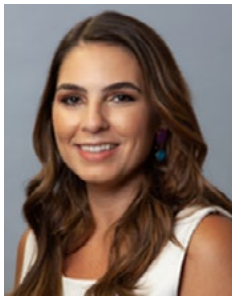

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ChatGPT – Legality and Legal Aspects Arising from its Use

Much has been said about ChatGPT recently, especially about the impacts this tool can bring to the work market and the possibility that its use can reduce the number of job positions. But what is this tool and what legal implications arise from its use?

OpenAI, the developer of ChatGPT, is an artificial intelligence research and deployment company, with Microsoft as one of its investors. The company has already developed several tools, the most recent of which is ChatGPT – a model trained to interact similarly to a conversation between humans.
The "training" of ChatGPT took place from the reading of texts available on the internet until 2021, that is, the system is not updated with new materials. However, it continues to be trained by interacting with users who, by dialoguing with the tool, enable the correction of wrong information and refusal of inappropriate requests.

Technological advances have enabled the creation of texts and conversations that are extremely similar to those produced by humans. Often, it is no longer possible, only by reading, to know whether a given text was created by humans or with the use of a computational tool, such as ChatGPT.

Due to this advance, several questions arise, such as: is it necessary to inform third parties about the use of technological tools to produce a text? Is the author of the content that was used in the training of this tool protected? Can the material that was produced with the aid of this model be used by third parties or does the user have any kind of copyright over such product?

Specifically with regard to ChatGPT, OpenAI's brand guidelines states that users are not required to attribute the text or images generated by OpenAI model when pushing it, however the users are encouraged to use language that indicate the use of the technology such as "written with ChatGPT", "caption written with ChatGPT" etc. In practice, as it is presumed that a text was written by humans, if part of the work has been developed using an artificial intelligence tool, it is necessary to indicate such circumstance.

Mentioning that certain content was created by means of interaction with ChatGPT or any other platform of artificial intelligence does not remove the

users' responsibility for the content generated by using it. That is, those responsible for the content generated will always be individuals, not least because a machine cannot be held directly accountable for damage caused as per the currently rules in force. Discussions regarding the responsibility of machines are increasing and it is not possible to know how the matter will be treated in the future.

According to the terms of use of OpenAI, users are responsible for all the content included in the platform, and receive from the company the right, ownership and interest in all the content generated for using the platform. Thus, users are responsible both for the content included and generated, and are solely responsible for ensuring that such content does not violate applicable laws.

OpenAI does not disclose details about the content and origin of the texts that were used for the development and training of ChatGPT, and expressly disclaims responsibility for the quality and legality of the content generated by the users' interaction with the model. Therefore, users must be very careful and judicious when analyzing the result of interactions with ChatGPT, even more so when the intention is to disclose it to third parties, either by publishing such content or using it as a basis for another work.

According to the policy for using the OpenAI platform, content generated related to, among others, criminal law, law enforcement, government affairs, health, finance and news poses high risks. For this reason, the platform encourages users to carefully test the content generated and ensure that they have mastery and experience regarding the matters subject to integration with ChatGPT so that they can confirm their suitability. Additionally, the use of the model to illegal activity, child sexual abuse, generation of hateful, harassing, or violent content, activity that violates people's privacy, among other uses, are disallowed and the violation to such rule may result in the suspension or termination of the user's account.

As it is an artificial intelligence tool that, therefore, can be improved over time and use, it is expected that ChatGPT collects data from user interaction for system improvement. According to OpenAI, the model is constantly improved not only by scientific and engineering improvements, but also by exposure to real problems and data. According to the platform, when this information is used, personal data that may identify users is removed and only a small portion of the information is used to improve the system. In any case, users who do not feel comfortable with sharing data may request that their data not be used by e-mail.

It is already clear that ChatGPT represents a paradigm shift and a huge evolution in the artificial intelligence model. Although these changes generate fear among a large portion of the population, it is very difficult to stop its use and

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evolution, and it is up to us to adapt and to pursue a solution for the regulation of this innovative technology. Many doubts will still arise, but just as machines continue to evolve, we users will also evolve and adapt our concepts, rules and understandings about technology.

Immigration to Brazil: Status for Legal Dependents

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An immigration process is always a big challenge for all involved parties, immigrants, Human Resource Team, lawyers and authorities. However, for the immigrant who is accepting a brand new position or for the Brazilian who is without your family, the legal status of family's members is always a major concern in order to have everyone together and living in Brazil.

So, how the current Immigration Law handle this specific situation?

In order to understand the procedure, it is important to mention that few years ago, the old immigration law would have had a "combo procedure" for all immigrants who belong to the same family - the principal immigrant under the main visa's request (called "*chamamante*" / "caller") and all other family's member (legal dependents and called as "*chamado*").

At that time, the procedure for legal dependents of immigrants would initiate in Brazil (Ministry of Labor) and all information and documents would need to be presented to the Brazilian Consulate which was responsible to check and issue the visas – this authorization would need to mention all names, principal immigrant and family's member (even though the visa would need to be stamped in each passport).

Since the end of 2107, we had a considerable modification and the procedure was completely changed. The Brazilian authorities publicized the **inter-ministerial ordinance nº 12/2018** which is now the current legal base for all legal dependents and determine the temporary visa and residence permit base on the **Familiar Reunion**.

In this way, the procedure is commonly called **Familiar Reunion** and based on the immigration law, the immigrants have to apply for an individual procedure (one for each legal dependent). However, the legal dependent will be "linked" to the main immigrant (the one who has the main visa to Brazil) or the Brazilian Citizen.

Moreover, the **Familiar Reunion** could be granted to the following immigrant:

- spouse or partner, without any discrimination, under the terms of the Brazilian legal system;
- child of a Brazilian or immigrant beneficiary of a residence permit;

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- stepchild of a Brazilian or an immigrant beneficiary of a residence permit, provided that she/he is under 18 (eighteen) years of age, or up to 24 (twenty-four) years of age, if proven to be a student, or of any age, if proven to be economically dependent on the "caller";
- who has a Brazilian child;
- who has an immigrant child who is the beneficiary of a residence permit;
- ascending to the second degree of Brazilian or immigrant beneficiary of residence permit;
- descendant up to the second degree of Brazilian or immigrant beneficiary of a residence permit;
- brother of a Brazilian or immigrant who is a beneficiary of a residence permit, provided that she/he is under 18 (eighteen) years of age, or up to 24 (twenty-four) years of age, if proven to be a student, or of any age, if proven to be economically dependent on the "caller"; or
- who has a Brazilian under his guardianship, curatorship or guard.

The inter-ministerial ordinance nº 12/2018 indicates 2 (two) possible ways in order to apply for a Familiar Reunion:

1. Request before the Brazilian Consulate outside of Brazil (when the legal de pendent is out of Brazil):

The legal dependents would need to take care about the procedure before Brazilian Consulate abroad in order **to issue the visas on the passports** (just after the principal immigrant has the approval through the immigration's process at Ministry of Justice in Brazil or residency process already granted). The legal dependents could apply for the Familiar Reunion at the same time the principal immigrant and then all family will have the visas stamped on the passports. For this option the Brazilian Consulate will determine which is the applicable documents and procedure to be followed. Once granted the Familiar Reunion, the immigrant holding a temporary visa have to register with the Federal Police within the deadlines established by law (after first arrival).

2. Request before the Federal Police in Brazil (when the legal dependent is in Brazil):

If the procedure before the Brazilian Consulate abroad is not possible for some reason (strategy, timing, documentation...), then the legal dependents could come to Brazil under a VISITOR VISA and apply, in the territory, for the Familiar Reunion before the Federal Police (Brazilian authority). At the same scheduled date of attendance, the family's members will apply for the Familiar Reunion and will complete the registration's process. For this option before the Federal Police, no visa will be issued.

Then, it is important to highlight that a Familiar Reunion is a procedure based on a preexisting legal condition (Brazilian child; Marriage / Union Stable with a Brazilian; an immigrant with a work authorization and so on), but the legal condition has to be legally proved during the process, based on an official document (apostille/legalized, updated and, depending on the case, translated into Portuguese by a sworn translator based in Brazil).

For this reason, it is always recommendable to check in advance with Federal Police / Brazilian Consulate responsible for the jurisdiction which documents are applicable – the requirements have to be accomplished in other to have a positive result.

Also, during the analysis, in order to grant visas and residence permits, the Brazilian authorities will take a few actions and instructional activities to investigate the principal legal condition (legal familiar relationship). Based on all official documents provided and actions, the Brazilian authorities will make the final decision. So, the Brazilian authorities could ask for personal interviews, extra documents, without prejudice to the right of immigrants to propose other forms to proof the main “familiar link” (legal familiar relationship).

On the other side, the immigrant who receives a residence permit, as a result of a Familiar Reunion is able carry out any work activity in the Brazil, including remunerated ones, under equal conditions with the Brazilian national, under the terms of the legislation in force.

Finally, the Familiar Reunion is a great and important advance in our Brazilian immigration law, allowing family members to reside, stay together and also work in Brazil.

All rules mentioned in this article are based on the current immigration law. By the time the procedure will be filed, it is recommendable to check with the Brazilian authorities the required conditions / requirements.

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The Watchmen Paradox Examining the Challenges of "Fake News" Regulation in Brazil

I. Introduction

In the universe of the Watchmen series, the question "Who watches the Watchmen?" reverberates, providing a poignant critique of power and control. The dilemma encapsulated in this question resonates with the challenges inherent in the proposed Brazilian Draft Bill, “PL 2630/2020”, which aims to regulate social media platforms, instant messaging services, and search engine websites in the name of combating misinformation.

The proposition raises fundamental concerns about freedom of speech and who ultimately decides what constitutes fake news. This parallels with the Watchmen's narrative, where superhuman individuals, despite their noble intentions, struggle with oversight and possible misuse of their powers (Just like real life, isn't it?).

A chief concern is the conflict of interest that could arise from these regulatory powers. Like the characters in Watchmen, these gatekeepers are not immune to personal and political biases. When agents are endowed with the power to regulate digital spaces, their political leanings could influence the interpretation of what constitutes misinformation.

Moreover, the potential for the “chilling effect” on free speech is another crucial consideration. The “duty of care” imposed on the platforms might lead them to over-censorship, inadvertently stifling legitimate expression out of an abundance of caution.

II. PL 2360/2020: Context and Proposals

The PL 2630/2020was introduced in July 2020 by Senator Alessandro Vieira (PSDB-SE) and aimed to modify the Civil Rights Framework for the Internet (Law No. 12.965/2014). In that initial version, the rules should be applied to any platform with over 2 million users.

[1]The "chilling effect" is a legal concept that refers to the situation where individuals or groups are deterred from exercising their legitimate rights (usually freedom of speech or other constitutional rights) out of fear of legal repercussions. The concern with chilling effects is that they can indirectly lead to censorship, not through the explicit prohibition of speech, but through creating an environment of fear or uncertainty that deters free expression.

The latest draft presented by Federal Representative Orlando Silva is almost twice the size of the Senate version. With 85 amendments (and counting) and having attached more than 90 other draft bills, PL 2630/2020currently has 60 articles.

Briefly, the most significant points of the latest version presented by Orlando Silva are:

a. the law applies to social media platforms, instant messaging services, and search engines that offer services to the Brazilian public and whose average number of monthly users in the country exceeds ten million;

b. according to article 32, the digital platforms will have to pay journalistic companies for all the content shared on their networks, an obligation from which they are entirely exempt under current legislation;

c. joint liability of digital platforms for the circulation of content generated by third parties (advertisers or not) that fall into crimes already typified in Brazilian law;

d. Joint liability of platforms for the failure in the "duty of care", which could undoubtedly result in self-censorship by the platforms;

e. the obligation of digital platforms to identify, analyze and combat “systemic risks”, some abstract and subjectively interpreted such as: - promotion of the right to information and press and to the pluralism of the media, - risks with serious negative consequences for physical and mental well-being, - disproportionate impacts due to personal characteristics, among others.

Among the most absurd aspects of PL 2630/2020, we can mention Article 12, which gives the Government the authority to establish a "security protocol" for a period of 30 days, with the intention of "overseeing" (read controlling) internet providers such as YouTube, WhatsApp, Twitter, etc., having the power to decide which content is removed and even what can or cannot be published, a situation comparable to that of dictatorial countries.

The PL does not specify what circumstances can trigger this protocol, stating that it can be established in the face of "systemic risks" or due to insufficient mitigating actions on the part of the providers. Such “security protocol” can be indefinitely extended by new extensions every 30 days through a motivated decision ex officio that “demonstrates the continuity of imminent risks.”

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We understand that, in practice, creators can have their content removed without any reason or possibility of appeal or, worse, due to political persecution by the State.

Without clear limits on what the Government can control, this provision could easily be subject to abuse, which means that legitimate content could be removed without much explanation.

Likewise, article 47 of PL 2630/2020lists a series of potential penalties for providers who violate the stipulations of the legislation, some of which could have profound impacts on the operations of digital platforms. The penalties range from warnings and fines to the temporary suspension of activities.

This last penalization, in particular, is especially worrying. The temporary suspension of a platform's activities means shutting down its services. If applied to large-scale platforms, this could significantly impact millions of users. Given some of the law's abstract provisions, digital platforms could unintentionally fall foul of the rules, leading to harsh penalties and operational disruptions (leading to the chilling effect... again).

III. The Exacerbation of State Protectionism and More Efficient Alternatives

PL 2630/2020reflects a worrying trend of overprotection by the State. Although the intention to curb the spread of misleading information is legitimate, the project brings disproportionate measures contrary to democratic principles.

The challenge of combating fake news is rooted in the intricate task of discerning truth in a landscape where facts often reside in a grayscale area of debate. Establishing an absolute yardstick for truth is complex, given its subjectivity and multiple perspectives. Furthermore, it's worth noting that the current Brazilian legislation already comprises a comprehensive toolkit to address potential online crimes.

Unfortunately, Brazil tends to over-legislation, a continuous endeavor to pass new laws that often exacerbate legal uncertainty. This trend, paradoxically, can diminish the effectiveness of legal systems, fostering an environment of ambiguity rather than clarity, which further complicates the task of effectively addressing issues like misinformation.

More efficient and balanced alternatives exist to address the spread of fake news without compromising fundamental rights. Digital education and the promotion of critical thinking can be implemented, enabling individuals to identify and disregard false information.

IV. 'Who watches The Watchmen?'

In conclusion, as we venture into the uncharted territory of regulating online spaces, we should strive to balance the need for order with the principles of freedom of speech, diversity of opinion, and privacy.

An essential part of the law proposes a 'duty of care' that requires online platforms to proactively regulate content. If enacted, this might give rise to a new class of 'watchmen' – powerful tech companies or state agents granted the authority to oversee digital discourse.

But who will monitor these monitors?

As Milton Friedman once said: "Just tell me where in the world you find these angels who are going to organize society for us."

'Who watches the Watchmen?' should not remain a rhetorical question but should incite rigorous debate, meticulous oversight, and legislative caution.

We must ensure the watchmen of our digital society are not unchecked superhumans bureaucrats (or angels), but accountable entities, diligently balancing their duties with the rights of the citizens in order not to undermine our democratic values.

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Brazilian new transfer pricing rules: Challenges for multinational companies

The impeding sanction and conversion into Law of the Provisional Executive Order ("PM") n. 1,152/22 will introduce a new transfer pricing era in Brazil.

The current transfer pricing ("TP") rules, provided by Law n. 9,430/96, isolated the country from the global TP standards defined by the Organization for Economic Cooperation and Development (OECD).

The rules aimed to be practical and objective. Thus, they were mostly based on the application of fixed margins and methods and not fully on the arm's length principle. As per the content of the PM, the principle will be fully applied for the purpose of calculating the tax basis of Brazilian corporate income taxes.

Even though the new TP system aims to mitigate double taxation and tax avoidance risks on transactions carried out by multinational companies and increase their level of investments in Brazil, in practice, the changes involve major adaptation challenges, which will be briefly discussed below.

a) Increase of tax complexity and potential legal (un)certainty

As already observed in OECD member countries, the adoption of the new rules implies the need for robust economic analyses of the controlled transactions carried out between related parties, which should be supported by the delineation and analysis of the risks, the functions and the assets involved in each intercompany transaction.

This fact will result in the need for taxpayers to hire specialized advisory services, as well as to train and qualify their local teams in order to prepare the necessary documents and evidence to support their transfer pricing practices.

Moreover, as fixed margins will no longer apply, giving more flexibility for the definition of intercompany prices by taxpayers, that will imply in increased legal uncertainty regarding the appropriateness of the transfer pricing analysis carried out by the taxpayer and its acceptance by the tax authorities.

The challenge is even higher in the case of services and other intangibles where comparability is even more subjective. They are more vulnerable to changes in market conditions, which are more dynamic and unpredictable, affecting costs and margins.

The complexity increases in the 4.0 industry era, as it will be necessary to separate what is intangible in the sale of machines, defining its value in the total price of the good, charging it separately through license agreements.

b) Selection of comparable transactions and lack of robust public databases

For the purpose of identifying the transfer price under the arm's length principle, it is recommended that both taxpayers and public authorities conduct the economic analysis of the transactions based on robust public information that allows the research of the prices practiced in comparable transactions at regional and global levels.

However, a system that allows for such integrated public research has yet to be developed. That will depend on notable efforts by the tax authorities so that, when the new rules become mandatory, the taxpayer may conduct its analysis and research based on reliable and publicly available data.

As a solution, taxpayers should seek the Master File report of their economic group, since after the mandatory adoption the new rules, it will be required to have a detailed understanding of the business value chain.

c) Application of the new TP rules on intercompany reimbursement transactions

One of the most controversial topics in intercompany transactions is the reimbursement of expenses related to back-office activities performed by parent companies abroad. In countries where the OECD model is applied, the issue is also subject to discussions.

In cases where a parent company centralizes administrative, financial, marketing and HR activities in the interest of other group companies, and this is not its corporate purpose, there is no reason to require a profit margin. Since in OECD countries there are no taxes on remittances abroad, there is no concern to use the term “services” more generally.

In this type of relationship, the objective is not to economically explore a certain activity, so much so that it is not offered to third parties, but to gain efficiency in the centralization of this activity. Thus, if there is no profit intention, there is no income to be taxed. It is a mere reimbursement of expenses. When §5º of article 24 of the MP establishes that a profit margin will be admitted, it opens space for the activity to be carried out without a margin. And if so, it does not fit into the concept of service provision with regard to the taxes levied on remittances abroad.

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Conclusion

In any scenario, companies should be prepared to produce robust documentation and enough evidence to justify their transfer pricing practices. Adherence to the OECD model will mean a new era of large, long, and expensive disputes with the tax authorities, as is already the case in countries that follow this model.

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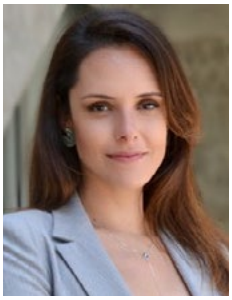
Setting the record straight concerning outsourcing in Brazil



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Recently, news coverage in Brazil has been highlighting several cases in which the Brazilian Supreme Court annulled employment relationships previously recognized by Labor Courts in cases involving professionals hired through a legal entity ("PJ[1]").

Lack of contextual information and in-depth analysis of those complaints' decisions by the press may lead to the incorrect understanding that the hiring of PJs is a form of hiring that companies can widely use without the risk of having an employment relationship recognized as such (with all the legal obligations that apply).

As that alternative is not risk-free (and because the matter has not been dealt with all the needed *caveats*), we have decided to use this space to clarify the matter.

I. Brief context about outsourcing in Brazil and the 2017 Labor Reform

The first applicable norm dealing with outsourcing comes from a precedent set by the Superior Labor Court in the early 80s, filling a gap in the legislation and stating to be fraudulent the outsourcing of a company's core activities. For more than 30 years, except for temporary work, Labor Courts in Brazil applied that standard regardless of whether the requirements of the employment relationship were identified in the provision of the services in question.

That situation changed in 2017, when Law N. 13,467/2017 (the "Labor Reform") was adopted and changed the rules of the game: Outsourcing in Brazil was legalized without the core-activity limitation, as long as the outsourcing company had the economic capacity to provide its services.

II. What the Supreme Court says about outsourcing in Brazil

On August 2018, the Supreme Court held the joint trial of ADPF[2] 324 and RE[3] 958.252, cases that challenged the constitutionality of labor outsourcing in Brazil. In a nutshell, the Court declared that outsourcing or any other form of division of labor between distinct legal entities is lawful regardless of the corporate purposes of the companies involved.

In April 2020, in the joint judgment of ADC[4] 48 and ADI[5] 3.961, the Supreme Court stated that the Brazilian Constitution does not prohibit outsourcing. Finally, in October 2021, when judging ADI 5.625, the Court also decided that a partnership contract is null when used to disguise a factually existing employment relationship.

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Based on those precedents, companies that were ordered to pay labor awards resulting from the recognition of employment relationships with PJs sought remedy for the Supreme Court, filing complaints requesting the annulment of Labor Court decisions.

[1] PJ is the Portuguese acronym for a legal entity. Under this form of hiring, the consultant sets up a legal entity to issue invoices to the contracting party.

[2] Arguição de Descumprimento de Preceito Fundamental ("ADPF") - Action Against the Violation of a Constitutional Fundamental Right.

[3] Recurso Extraordinário ("RE") – Appel to the Supreme Court.

[4] Ação Declaratória de Constitucionalidade ("ADC") - Action for the Declaration of Constitutionality.

[5] Ação Direta de Inconstitucionalidade ("ADI") – Direct Action for the Declaration of Unconstitutionality.

III. Analysis of the Supreme Court complaints' decisions and conclusions

In all complaints' decisions we have analyzed, the Supreme Court annulled only those Labor Court decisions in which the recognition of the employment relationship was based solely on the fact that the activities performed by a given worker were part of the company's core business under scrutiny. This means that the Labor Courts whose decisions were overturned did not delve into whether the requirements of an employment relationship were present in the concrete case.

In one of those cases (Complaint 56499/RJ), Justice Luís Roberto Barroso stated that labor outsourcing contracts, partnerships, and the provision of services by PJs are lawful if the non-employment contract entered into by the parties is authentic, i.e., there is no employment relationship between the PJ and the company that takes the service. Accordingly, a contract would be fraudulent if it is possible to identify subordination, working hours control, and other obligations typical of an employment agreement.

That means that although hiring a PJ is lawful even for the company's core activities, such an alternative is not exempt from labor-related risks. Therefore, a PJ should provide its services with as much autonomy and independence as possible from the contracting company to mitigate the risks of characterizing an employment relationship.

Therefore, if the Brazilian legal requirements of an employment relationship are, in fact, identified in a PJ relationship, the contracting company could be exposed to the contingencies resulting from labor lawsuits filed by the affected PJ: employment entitlements as well as social security contributions not paid during the term of the relationship - with probable chances of success. The PJ may file a labor lawsuit within two (2) years after the termination of the contract, and the claims may retroact for five (5) years (statute of limitation terms). The company may also be exposed to fines imposed by the Social Security Agency and the Ministry of Labor.

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