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Inhalt

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Vorläufige Maßnahme 892: Änderung der Veröffentlichungen brasilianischer Aktiengesellschaften

Am 5. August 2019 wurde die Vorläufige Maßnahme 892 veröffentlicht. Es handelt sich um eine Änderung der Veröffentlichungsregelung für die brasilianischen Aktiengesellschaften.

Gemäß Paragraph 289 des Gesetzes Nr. 6404/76 (Gesetz der Aktiengesellschaften) mussten die Aktiengesellschaften verschiedene Dokumente, u.a. die Einberufung zu Hauptversammlungen, die Beschlüsse ihrer Aktionäre bei deren Hauptversammlungen, die jährliche Bilanz, in der regierungsamtlichen Zeitung und in einer Zeitung mit großer Auflage veröffentlichen. Aus diesem Grund waren den brasilianischen Aktiengesellschaften immer beträchtliche Kosten entstanden.

Zur Senkung dieser Kosten hat die *Vorläufige Maßnahme 892* den oben genannten Paragraphen geändert, damit alle Veröffentlichungen der Aktiengesellschaften auf den Internetseiten der brasilianischen Wertpapieraufsichtsbehörde (CVM) und der Verwaltungseinheit, bei der die Wertpapiere der Gesellschaft gehandelt werden (z.B. die Börse) getätigt werden. Diese elektronischen Veröffentlichungen müssen kostenlos sein.

Außerdem bestimmt die *Vorläufige Maßnahme 892*, dass die Aktiengesellschaften dieselben Dokumente auch auf ihrer e igenen Internetseite zu veröffentlichen haben.

In allen Internetseiten muss die Authentizität der elektronisch veröffentlichten Dokumente durch digitales Zertifikat von einer von der ICP-Brasil akkreditierten Zertifizierungsstelle gesichert werden.

Vorgesehen ist auch, dass die CVM regeln wird, welche Dokumente und Veröffentlichungen zusätzlich auch noch im Handelsregister registriert werden müssen und in welchen Fällen die erwähnte digitale Zertifikation nicht verlangt werden soll (besonders für die Dokumente der kleinen und mittelgroßen börsennotierten Gesellschaften).

Dazu muss auch das Wirtschaftsministerium die Form der Veröffentlichungen und Bekanntgaben der nicht-börsennotierten Aktiengesellschaften regeln.

Die *Vorläufige Maßnahme 892* ist am 5. August 2019 in Kraft getreten und wird am ersten Tag des folgenden Monats nach der Veröffentlichung der ergänzenden Regeln der CVM und des Wirtschaftsministeriums wirksam. Allerdings bedarf die *Vorläufige Maßnahme 892,* um in ein Gesetz umgewandelt zu werden und wirksam zu bleiben, innerhalb der gesetzlichen Frist der Zustimmung der Abgeordneten und Senatoren.

Wichtig ist anzumerken, dass die *Vorläufige Maßnahme 892* das Zivilgesetzbuch (Gesetz Nr. 10402/2002) nicht geändert hat. Deswegen müssen die Gesellschaften mit beschränkter Haftung ihre Dokumente gemäß Paragraph 1152, § 1 in der regierungsamtlichen Zeitung und in einer Zeitung mit großer Auflage veröffentlichen. Das gilt u.a. für die Einberufung zu Hauptversammlungen, die Beschlüsse hinsichtlich mancher Unternehmensumstrukturierungen (z.B. eine Herabsetzung des Kapitals, eine Fusion) und hinsichtlich der Gesellschaftsauflösung.

Eine Ausnahme bilden hierbei diejenigen großen Gesellschaften mit beschränkter Haftung, deren Aktiva höher als R$ 240 Millionen sind oder deren jährliche Bruttoeinnahmen mehr als R$ 300 Millionen betragen. Laut Gesetz Nr. 11638/2007 sind sie verpflichtet, ihre Bilanz gemäß dem Gesetz der Aktiengesellschaften darzustellen, aber die Veröffentlichungspflicht der Bilanz ist unklar, und viele Gesellschaften sind deswegen gerichtlich vorgegangen. Nun steht zur Diskussion, ob sie auch unter die *Vorläufigen Maßnahme 892* fallen und ihre Bilanzen laut der zukünftigen Regel des Wirtschaftsministeriums zu veröffentlichen haben.

Wie in der Begründung der *Vorläufigen Maßnahme 892* erklärt wird, erlaube die heutige Technologie durch die elektronische Veröffentlichung auf der CVM-Internetseite einen sofortigen und breiten Zugang zu allen Informationen der börsennotierten Gesellschaften; die Veröffentlichung in der Zeitung sei demnach der heutigen Zeit nicht mehr angemessen. Argumentiert wird ferner, die damit verbundenen Kosten seien eine Barriere für den Zugang zum Kapitalmarkt und verhinderten häufigere Gründungen von Aktiengesellschaften durch kleinere Unternehmen, welche aus diesem Grund Schwierigkeiten hätten, sich effizient zu finanzieren.

Im Allgemein dürften sich die Kostensenkung und die nicht bürokratische elektronische Lösung auf die Unternehmen und die Geschäfte positiv auswirken, damit also auch auf die gesamte brasilianische Wirtschaft.

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New Brazilian Regulatory Agencies Law

After a decade of discussions, finally a new Regulatory Agencies Law[1] was enacted. It applies to the most important Brazilian federal agencies[2]. It deals with management, organization, decision-making process and relationship of Brazilian regulatory agencies and will come into force within 90 days following approval by the Brazilian President on 25 June 2019.

This is an important milestone for the modernization of regulatory agencies in Brazil. The new law is a huge progress for the structure, governance and operation of Brazilian federal agencies.

Highlights

The following key changes of the new Regulatory Agencies Law stand out:

Effective Autonomy

Guarantee of (effective) functional, decision-making, administrative and financial autonomy.

Standardization of management, organization, governance, decision-making and relationship

As from now on, all regulatory agencies follow the same rules, which will reduce existing differences among the agencies, ensuring and enhancing therefore greater certainty, predictability and legal safety.

Greater interaction between agencies in particular, among competition, consumer, environmental and other regulating authorities.

[1] **Law No.** 13,848/2019.
[2] **ANATEL** National Telecommunication Agency *(Agência Nacional de Telecomunicações),*
ANEEL National Eletric Power Agency *(Agência Nacional de Energia Elétrica),*
ANP National Oil Agency *(Agência Nacional do Petróleo),*
ANVISA National Health Inspection Agency *(Agência Nacional de Vigilância Sanitária),*
ANTT National Agency of Land Transportation *(Agência Nacional de Transportes Terrestres),*
ANAC National Agency of Civil Aviation *(Agência Nacional de Aviação Civil),*
ANS National Supplementary Health Agency *(Agência Nacional de Saúde Suplementar),*
ANA Brazilian Water Agency *(Agência Nacional de Águas),*
ANTAQ National Agency of Water Transportation *(Agência Nacional de Transportes Aquaviários),*
ANCINE National Film Agency *(Agência Nacional do Cinema),* and
ANM National Mining Agency *(Agência Nacional de Mineração).*

Improvement of decision-making process

As from now on all agencies have to prepare regulatory impact studies *(Análise de Impacto Regulatório – AIR)* before issuing any new rules or amending old ones. These studies must review and determine the impact of any new rule. We believe that these regulatory impact studies will be quite challenging and time consuming. Also, agencies must organize consultations and public hearings, as a way to include society and regulated sectors in the decision making process. As a way to avoid bias and legal uncertainty, the new Regulatory Agencies Law requires an absolute majority in board decisions. These two requirements are perhaps the most important changes the new Law brings about. They will greatly influence the efficient performance of agencies.

Transparency

The law implements new mechanisms that will increase transparency and relationship between agencies, which includes the recording of meetings and deliberation sessions so that these are available to the public. Also, ombudsmen's offices will be created and other mechanisms for access to information will be available.

Prohibition for operational interaction between federal agencies and state, district and municipal agencies or regulatory bodies: This includes the prohibition of: (i) delegating power to issue rules *(competência normativa)* to another agency; and (ii) imposing any additional obligation which had not previously been foreseen in the contract for concessionaires and permit holders.

Prevention of Corruption

Regulatory agencies must create integrity programs and adopt risk management and internal controls to prevent corruption.

Strategic planning instruments

Agencies are now required to implement long-term planning tools to control efficiency and performance (based on annual activity reports, strategic plans, annual management plans and regulatory agenda). The institutional benefits with such mechanisms is evident, and has a knockin effect on other areas of the Brazilian public administration.

Vetoes

Although the President approved the new Regulatory Agencies Law, he vetoed 5 provisions that will have to be approved again in the Brazilian Congress:

- mandatory accountability annual hearings of agencies' directors in the Senate;
- prohibition of reinstatement of current directors - on the grounds that this would create inequality in relation to directors appointed after the law passes;

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• 12-month quarantine for the appointment of directors who have held shares in companies that operate activities regulated by the agency responsible for the same industry/sector; and

• The recruitment process for agencies directors´ appointees by the agencies. The President understood that this measure restricts the constitutional power of the president to nominate directors.

Please do not hesitate to contact us if you need any further clarification on this matter.

The Use of COAF Data in Investigative Proceedings - Some Brief Considerations on the Recent Decision of Justice Dias Toffoli

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In order to prevent future decisions from being *"poisoned by nullity due to violations of the Constitutional mandates of data privacy and confidentiality (art. 5, sections X and XII, of the Federal Constitution)"* as a result of "criminal prosecutions based on the sharing of tax and banking information by control and inspection administrative organs with the Public Ministry, without an adequate demarcation of the limits on the information transferred", the current president of the Federal Supreme Court ("STF"), Justice Dias Toffoli, in an single-justice decision issued in the case of Extraordinary Appeal nº 1.055.941/SP (Issue 990 in the Issues of General Repercussion management system), and in response to a motion filed by the attorneys for the defense of Senator Flávio Bolsonaro, issued a preliminary injunction suspending the investigation against the latter that was begun based on a Financial Intelligence Report ("RIF") issued by the Financial Activities Control Council ("COAF") and provide to the Rio de Janeiro branch of the Public Ministry.

Despite the expected criticism that the decision in the case in question would engender, the justice also ordered the suspension of "*all ongoing judicial proceedings in the country"* concerning the same question, extending the decision to include criminal investigations and proceedings which, according to the text of the decision, had *"begun without the supervision of the courts nor any prior authorization of the sharing of data by inspection and control organs".* In short, the emphatic decision analyzed the Constitutional precepts regarding data privacy and confidentiality and whether or not any citizen's tax and banking data, regularly obtained by COAF, could be shared with the Public Ministry for criminal law purposes, without the prior intermediation of the courts.

According to the analysis by the justice in the decision referred to, in its analysis of the constitutionality of Supplementary Law no. 105/2001[1], the STF did not authorize the use of constitutionally protected information by the Public Ministry without a basis in a specific and well-grounded court order, having

[1] This law deals with the confidentiality of financial institution transactions and the possibility of sharing information with the Public Ministry for criminal law purposes, as well as the banking and tax information obtained by the Federal Tax Authority ("Receita Federal") in the legitimate exercise of its inspection duties, without prior authorization by the courts.

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been *"emphatic in stating that access to banking operations be limited to identification of the accountholders involved in the transactions and to the* ***total amount*** *transacted each month, that is, to the generic registration data of the accountholders,* ***the inclusion of any element that allows for the identification of the origin or [the] nature of the expenses being prohibited".*** In other words, for Justice Dias Toffoli, the prior decision of the STF recognized the constitutionality of Supplementary Law no. 105/2001 exclusively with regard to the sharing of information between financial institutions and inspection and control organs, such that the Public Ministry and the Federal Police were not authorized to use such information to initiate investigations designed to uncover the practice of any crimes. Thus, the suspension of each and every investigative proceeding in which data shared by COAF had extrapolated the limits of identifying the accountholders of certain banking operations and the total amounts involved was both legitimate and necessary, until the appeal could receive a final judgment.

Without any disregard for the arguments employed by Justice Dias Toffoli in his initial decision in the case, but at the same time raising the issue in light of the enormous impact that that decision may have on the activities of the Brazilian financial intelligence organ, we must ask what the proper role of COAF is?

As is the case in other countries (Spain, France, Germany, and Switzerland), our financial intelligence office is more in the way of an administrative agency than one with police powers, being responsible for identifying money laundering and terrorism financing operations. In practice, in addition to acting as a regulator, COAF aids criminal investigations by identifying possible flows of illicit funds that might have their origin in various criminal activities, especially public sector corruption, but it is not authorized to investigate those possible activities.

It is important to note that the purpose of COAF is not to determine whether a crime has occurred, nor could it be, as that is an attribution of the police. Instead, it operates as a control mechanism to receive, examine, and identify information in situations in which there is a suspicion of money laundering and to notify the competent authorities so that they may begin investigative proceedings. Moreover, COAF coordinates and exchanges information with foreign financial intelligence agencies, in order to facilitate rapid and efficient action to combat crime[2].

Put simply, COAF has an important role in investigating money laundering, performing its activities based on notifications of suspect transactions realized in the context of the sectors which are obliged to report to it[3]. That is the information that gives rise to an RIF, which is nothing more than a collection of data that, by itself, is insufficient to be the grounds for a formal accusation, as it comes bare of the circumstances surrounding the transaction being highlighted.

COAF is not a Brazilian creation but rather the fruit of a worldwide desire and effort to combat transnational organized crime, which routinely uses the criminal expedient of money laundering to achieve its ends. With a history of success, it has conferred greater transparency on Brazilian financial transactions for more than twenty years, in compliance with the international commitments the country has made.

The STF has a difficult task ahead as it will be necessary to take into account the necessary balance between the effective nature of the information shared by financial intelligence organs and the Constitutional protection of the individual rights.

[2] According to COAF's own account, in 2018 alone, it was responsible for producing and remitting 7,345 financial intelligence reports to the competent authorities, as well as for aiding in the blocking of BRL 176 million of suspicious origin. Currently, its database holds more than 16.7 million financial transaction registries.

[3] Among the players who are subject to mandatory COAF reporting are: financial institutions, factoring companies; real estate agencies; accounting offices; insurance brokers; companies offering various consulting and financial assistance services; and traders in jewelry and precious stones and metals.

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Brazilian Migration Legislation Overview

The Law 13.445/2017 (Migration Law), published at the end of 2017, presented to the national scenario a new way of conducting and interpreting immigration processes, since many changes were presented, both conceptual and practical.

The concepts have received new definitions; the procedures took a new form; the authorities, new roles, and everything began to change, so that Brazilian immigration became very different from the one practiced under the Foreign National Statute.

The Migration Law is much more comprehensive and open to the receptivity of immigrants, who had their rights increased and may rely on more abbreviated procedures. There is a real regularization of the migrant in the national territory easiness, a fact that was not observed in previous immigration procedures.

The Decree No. 9.199/2017 also went into the same direction, that is, all the regulation of the Law is presented with a new guise.

Still in this context of change, more than 30 Normative Resolutions have already been published by the National Immigration Council, and each normative resolution presents a distinct situation, with specific framing and precise applicability.

Additionally, there are also the Inter-Ministerial Ordinances published by the Ministry of Justice and Public Security, which contribute directly to the regularization of these immigrants.

It is important to emphasize the big news regarding the German nationals. Since the National Congress published, on July 23, 2019, the Legislative Decree No. 60, which approved the contents of the Memorandum of Understanding on the Vacation-Work Program which will enable citizens of both countries, aged from 18 to 30 years-old, acquire knowledge about culture and daily life and, at the same time, accumulate work experience. However, the respective normative resolution that will allow the request to be filed has not been published so far.

In any case, it is evident that we have a wide range of innovative and differentiated rules and standards, which increasingly drive immigration processes.

In addition to the legislative change, with the change of government in early 2019, Brazilian President Jair Bolsonaro signed Provisional Measure 870, which established the extinction of the Ministry of Labor (former body responsible for examining immigration applications). Thereby, the former competencies of this former Ministry were distributed to other Ministries and, for this reason, (i) Brazilian immigration processes, (ii) Labor Immigration Policy and (iii) National Immigration Council are, then, under the exclusive competence of the Ministry of Justice and Public Safety, which, among other duties, has the responsibility for the care of issues related to nationality, immigration and immigrants.

Regarding visa modalities, they are divided into the following categories: (i) visit; (ii) temporary; (iii) diplomatic; (iv) official and (v) courtesy.

Therefore, the Migration Law presents a single modality for the work hypothesis (temporary visa), which is why the **permanent visa** was terminated. In the past, the permanent visa has always been a very important visa for most executives with representative powers in Brazil and their respective legal dependents, as well as for immigrants that are legal dependents from Brazilians nationals (children / partners / husbands and wives).

Regarding the Residence, it should be noted that the immigrant may present their application while being in Brazil or while abroad. The request made while the immigrant is in Brazil is a great evolution, which enables many procedures without the need of the immigrant to leave the national territory.

The former Foreign National Statute (Law 6.815/1980) did not allow the Immigrant, who was already in national territory, to regularize their status, for temporary visa applications. Therefore, a great achievement is the possibility of submitting the residence application while the immigrant is already in Brazil, as this may shorten the process and avoid higher costs for those involved.

With respect to the identity of the immigrant, the former immigrant identification card, previously called RNE (Foreigner´s National Registration) has been replaced by the National Migratory Registration Card (CRNM).

Finally, it is worth highlighting the issue of **infractions and penalties** directly linked to the Brazilian immigration process. Firstly, Law No. 13.445/2017 creates a new criminal type, namely, “Promotion of Illegal Migration”, a crime that was duly incorporated into the Brazilian Penal Code, which aims to punish the promotion, by any means, to obtain economic advantage of illegal entry of immigrants in national territory or Brazilians in foreign countries.

Otherwise, alongside the criminal type, there are administrative sanctions that are listed in Law No. 13.445/2017 and ratified in Decree No. 9.199/2017.

Regarding **administrative sanctions,** it is worthy mentioning that these will apply to both individuals (immigrants) and legal entities (companies). For **individuals,** the minimum amount of the assessment may be R$ 100.00 (one hundred Reais) and a maximum of R$ 10,000.00 (ten thousand Reais). For **Legal Entities** (per act) the minimum amount may be R$ 1,000.00 (one thousand Reais) and the maximum of R$ 1,000,000.00 (one million Reais).

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However, in the dosimetry of the penalties will be considered the **recurrence** (the value may be quintupled), as well as the **economic situation** of the defendant, since the fine may be increased to the maximum if the assessing authority understands that the minimum individualized value is considered ineffective to the defendant.

Based all this information brought, it is clear that we are at a new moment of the immigration processes, which is constantly changing and renewing itself. In conclusion, for all the foregoing, early planning for the arrival of immigrants is fundamental to enable the implementation of the new rules, thus avoiding risks with compliance, image and administrative infractions.

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Rules of Origin and Global Trade

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Since the 2008 financial crisis, there has been a serious threat to the world economy. The bedrock of the multilateral trading system is facing severe challenges, with nondiscrimination and contractually bound levels of protection being increasingly ignored or just side stepped. Such a circumstance becomes evident by the rising tensions between majors trading partners. China and the United States (US) quarrel over commercial sanctions. The latter has also ceased the Trans-Pacific Partnership (TPP) negotiations as its president-in-office stated his preference in bilateral conventions instead of multilateral ones. The UK has decided to leave the European Union (EU) and is currently negotiating several bilateral agreements to come into effect upon the implementation of Brexit. The same applies to Brazil. With the exception of the treaty between the EU and Mercosur, Brazil's current president has always been a critic of globalization and shown greater support towards bilateral trade negotiations rather than multilateral.

In this scenario, it is important to understand the part played by rules of origin in international commerce. They are the set of rules, regulations and administrative decisions that must be met for a product to be considered as originating in a given country, and therefore define how it will be treated in global trade.

The Agreement on Rules of Origin, signed at the end of the Uruguay Round, requires World Trade Organization (WTO) members to ensure transparency in their rules of origin so that they do not have restrictive and distortive effects on international trade. For these reasons, they should be managed consistently, uniformly, impartially and reasonably, and based on positive standards. Yet, despite these organizations' efforts, rules of origin still vary quite a lot in the miscellaneous of treaties and internal law of each country.

Most commonly, rules of origin rely on the following criteria to determine a goods' nationality:

- If it is composed only of materials originated from said country (totally obtained, elaborated or produced in its territory), or
- If composed of materials not originated from said country, the last **substantial transformation** must have been carried out in its territory. In general, this criterion is met when **(1)** the final product must have undergone a change of tariff heading, **(2)** value of inputs from third countries must not exceed a certain limit of participation of the value of the final product, **(3)** materials must have been submitted to certain manufacturing or processing operations in the country's territory (mere packaging in a country, per example, does not modify the product's origin).

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Furthermore, these rules are customarily systematized into two categories: non-preferential and preferential.

Non-preferential rules of origin are the set of rules not related to contractual or autonomous commercial regimes. These rules are established by the importer country and applied in general.

They are usually practiced when a country applies the most-favored-nation treatment, antidumping duties and compensatory rights, safeguard measures, discriminatory quantity restrictions or quotas, labelling and marking requirements, trade statistics and government procurements.

Preferential rules of origin, on its turn, are established in a trade treaty entered by two or more countries, regulating preferential import treatment. Ideally, these rules are clear enough to avoid uncertainty and ensure that imported goods effectively originated from the agreeing countries are treated exactly as provided in the treaty.

For example, Mercosur zeroed tariffs on trade among its members regarding goods originated in their territory. To be considered as such, the bloc's agreement has established that, when materials are composed from production inputs from a non-member country, all three conditions mentioned above must be met – change of tariff heading, value added to final product and enough manufacturing or processing operations in one of the members' territory.

Brazil also participates in several other treaties – as a Mercosur member or by itself with non-member countries – that guard their own particularities in origin determination.

Another rule of origin example may be found in the scope of the Generalized System of Preferences (GSP), in which developed countries may eliminate duties on listed products in unilateral, non-reciprocal, autonomous and temporary basis, provided that the beneficiary country is considered a Developing Economy, according to the importing country's rule of origin. This matter was thoroughly discussed in the second quarter of 2019, when current Brazilian and American presidents mentioned the possibility of, in exchange of the US support in Brazil's claim for an OECD membership, the country waiving its status as a developing country before the WTO. However, this would imply also waiving its eligibility to GSP treatment, with important impact to Brazilian exports not only to the US, but to all other countries or economic blocs that include it in their GSP program as well (Australia, Eurasian Economic Community, Japan, Norway, New Zealand and Switzerland).

We believe that the uncertainty in international scenario will set rules of origin on a brighter spotlight in the near future, especially to companies that structure their operations internationally through outsourcing and offshoring of activities, locating different stages of the production process (design, production, marketing, distribution) across different countries, meaning companies inserted in the Global Value Chains (GVC).

Standardization and regulation of aspects of international trade, accordingly, should be a priority to countries that wish to participate on the GVC and bring new investments to their economy: imperative for the development of international trade.

Brazil would be a step closer to entering the GVC if it were to exert efforts to harmonize its preferential and non-preferential rules of origin, in accordance with WTO and World Customs Organization (WCO) principles, as it is endeavoring the adjustment of Brazilian transfer pricing rules to meet OECD standards.

The recent agreement between Mercosur and the EU is a good example on the essentiality in clarity and preciseness in the definition of rules of origin. From information disclosed so far - since the full text of the treaty was not yet published -, it is still unclear which criteria were chosen to define good's nationality, and the broad or imprecise determination of this topic may as well implicate the treaty's sheer inefficacy.

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E-Social - New updates proposed by the Government and MP nº 881/2019

The E-Social (Digital Bookkeeping System for Tax, Social Security and Labor Obligations) is the system created by Decree No. 8,373/2014 through joint action of some Federal entities with the main objective to unify in a single system the collection of information by storing them in a Virtual National Environment, in order to allow the participating agencies of the project, as far as the thematic pertinence of each one, to use such information for auditing/supervision/monitoring purposes for labor, social security, tax and for the calculation of taxes and social charges.

Until the E-Social system came into force, information regarding employees and HR were not consistent and did not always present the same information, such as single and married names, number of income tax dependents, among others.

With the entry into force of E-Social, the main difficulty faced by companies was the Planning phase, where companies had to deal with inconsistencies among employees' information and the subsequent inclusion of all information in the system. It was after this phase that regular data sending began effectively.

After the registration of data, E-Social began to require companies in their subsequent phases to report all labor movements, from payroll to dismissal - data that were previously communicated to different authorities such as Social Security, Ministry of Labor and Federal Tax. As well as data that were often ignored or even procedures that were performed without respecting legal deadlines, such as: vacation payments, vacation deadline, work card signature, personal data information, etc.

During interviews with companies and accounting firms, it was found that the main difficulties reported by companies are: Inconsistencies and duplicate data; The amount of information required is too large and raises costs to the Human Recourse and Accounting departments; companies fear fines for failing to deliver data on time; government has made constant changes in the testing phase and required companies to adapt as well and there is a lack of information and awareness campaigns.

Companies specializing in accounting and labor data have invested more in human resources, accounting, and IT outsourcing to run a software that "dialogues" with the government base. The new system brought insecurity to the Companies, since the adaptation to new technologies must be agile and it is not known how the controls will be performed. Therefore, companies must comply with current legislation, not only in the documentary part, but also in the internal procedures that are performed.

However, in April 2019, Provisional Measure 881 was published related to economic freedom and with it the government took advantage of this provisional measure to make several modifications to labor issues, including: the release of Sunday work for all categories of companies with only one Sunday a month; CIPA being mandatory only for companies with more than 20 employees and exempt for small businesses and the creation of the digital work card. In addition, workers who receive more than 30 minimum wages will no longer be protected by labor legislation, but by civil law. Regarding the E-social, the new measure predicted its end, with the aim of replacing it in 2020 with two simpler new systems, when a transition will start between the current system and the new ones.

As a result of its implementation, the new system will simplify and integrate the current difficulties that companies are having in order to be in compliance with internal processes and with the demands from E-social. Such simplification will result in productivity gain, expenses reduction, and greater legal security for companies and employees.

The provisional measure needs to go through the approval of the Chamber of Deputies and the Plenary of the Federal Senate, which must occur until September 10, 2019.

The current Government informed that, in the coming months, with the approval of the Provisional Measure, It will begin to publish regulations predicting the changes to be made in order to simplify the information required by the current system, such as the unification of the employees' registrations under one number and the creation of the digital work portfolio.

Lastly, it is worth mentioning that, as long as there is no new system for receiving the information sent to e-Social, even with the possibility of a total replacement of it, Companies are still obliged to send information and collect taxes through the current system.

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Brazilian Tax Reform: Domestic Law and Foreign Trade Challenges

Facing an economic crisis that started by the end of 2014 and, so far, without any evidence of a solid and consistent economic reaction, Brazil is going through a unique moment of its History by placing structural reforms at the top of its legislative agenda. After labor law reform passed in 2017 and considering that the pension law reform is now at its last stages of approval at the Federal Senate, now it is time for the tax law reform.

There are several projects of tax law reform over the table. The most prominent one at the legislative agenda is based on the project developed by Tax Citizenship Center ('Centro de Cidadania Fiscal – C.CiF'), endorsed by Congressmen (Baleia Rossi and others) and embodied in the Constitutional Amendment Proposal n. 45/2019.

C.CiF Project has four main aspects that can raise concerns.

Firstly, the project intends to replace five existing taxes on consumption – ICMS, ISS, PIS, COFINS, and IPI – by just one: Goods and Services Tax (GST).

The GST is inspired by the European Value Added Tax (VAT). It is non-cumulative, and it targets the value added by each of the participants of the market through a tax credit calculated according to the amount of tax paid by the last step of the economic chain. In this context, the main challenge faced by the GST is to solve the residual cumulativeness of the existing system due to the lack of efficient mechanisms capable to provide a fully non-cumulative VAT.

The GST will target a broad taxable base comprising consumption of goods (both tangibles and intangibles), services, rights and leasing of goods. The choice of taxable basis for the GST is in line with the recent case law from the Brazilian Supreme Court which conceives the concept of goods and services according to a more liberal perspective. It is also better designed to face the challenges brought by the digital economy.

Secondly, the GST collected will be shared by all federative entities (*i.e.,* Federal Union, States, Municipalities and the Federal District) according to its participation in the rate applicable. After collected, taxes will be shared by a national committee, whose components will be representatives from all the federative entities, also in charge to create a common tax statute and common rules for tax assessment.

From the perspective of Brazilian Federation, such a national committee gives rise to concerns related to the adequate balance of political interests in distributing tax revenues and the autonomy of States and Municipalities concerning the source of its tax revenues. Depending on the prevailing political interests, some entities can have its due share on overall tax revenues jeopardized.

Moreover, the Brazilian Constitution has a very rigid delineation of tax competences – some scholars see then as a 'stone clause' – within the Federation. Therefore, its doubtful whether those tax competences can be changed by a Constitutional Amendment. If the project is approved, the final word on this issue will be given by the Brazilian Supreme Court creating, for now, legal uncertainty.

Thirdly, the GST intends to replace the existing hybrid regime (based on the principle of origin and destination) by a purely destination-oriented regime – following the European VAT.

This is seen as a key measure to solve the domestic tax competition that took place among States and Municipalities through the provision of unlawful state aids. The rationale assumes that, if the place of the consumption market is entitled to jurisdiction to tax instead of the place of production, there will be fewer opportunities for tax competition since the consumption market (*i.e.,* people) cannot be changed as easily as production factors can be.

Furthermore, adopting a purely destination-oriented regime is also understood as a key measure in order to solve the most sensitive problem created by the existing hybrid regime: the incentives created to imports instead of acquisitions of goods and services from the domestic market, and the discouragement to exports.

On the one hand, the existing system induces imports instead of acquisitions from the domestic market because the former is taxable by the importing state at a full rate whereas domestic acquisitions from other states of Brazil are taxable at a reduced rate.

On the other hand, the existing system discourages exports since exporting states are commonly poor states in Brazil. According to the Brazilian Constitution, exports are tax exempted and the taxes on consumption paid must be reimbursed to the taxpayer. Therefore, it is very clear that, from a purely exporting state perspective, inducing exports is not good business.

The reform project intends to address this issue by aligning the principle of destination with redistributions of the Federal Union participation on the GST to States according to their participation in exports of manufactured products. However, without any additional mechanism capable to reduce the economic burden faced by those exporting states, it is doubtful whether this measure will be capable to *de facto* induce exports.

Fourthly, the transitional rules. According to the tax reform project, there will be a period of (at least) 10 years to replace the existing system by the new GST.

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Meanwhile, both tax systems (*i.e.,* the current system and the GST) will co-exist. Therefore, there is a considerable risk that the overall tax burden increases, instead of remaining unchanged.

Finally, another sensitive issue that creates legal uncertainty is related to the tax credits accumulated by taxpayers. Will the taxpayer be entitled to use them on the new regime? How could those tax credits be offset against the GST? Will taxpayers be reimbursed from those credits?

None of those questions have an answer, so far.

In short, we believe that the oversimplification brought by the C.CiF project raises more concerns than solutions to the existing challenges. Some issues are complex by their nature. Tax reforms involving consumption taxes bring many concerns related to Fiscal Federalism, constitutional provisions, domestic and foreign trade, the competitiveness of Brazilian corporations and legal certainty. Therefore, no magical and oversimplified solution is capable to provide for a satisfactory solution.

The main concerns raised by C.CiF project relates to the autonomy of federative entities, the rigidness of constitutional provisions on the delineation of tax competences and the tax credits accumulated under the current system. As the debate is still in its early beginning, is yet to be seen if and how Congressmen will address the several challenges arising from this project.

Dispute Settlement in the new EU-Mercosur Trade Agreement

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Due to the growing business relationship and as proven in many meetings on a high level of both sides, Germany and Brazil are interested in rapidly evolving into a free trade dialogue as they have many growing opportunities between each other for fruitful bilateral trade and investment.

In terms of comparative advantages, the list of raw materials that Brazil exports fits precisely Germany's needs and scarceness. Conversely, German producers specializing in high-end technological and knowledge-based goods could find an expanding consumer base both in the burgeoning Brazilian middle class and in business-to-business trade with Brazilian partners.

In terms of investment, Brazil would appear to be a prime destination for Germany's contractors and service providers. As it is known, Brazil faces an infrastructure deficit, while German firms have achieved distinctiveness in this field. For German firms, investment in this sector in Brazil can offer returns that are nonexistent in continental Europe.

Nevertheless, the relationship has yet to reach its full potential. Politics and policies have curtailed trade expansion. Brazil's membership in the Mercosur trade bloc and Germany's membership in the European Union have hampered the pair's ability to forward a bilateral trade agreement, as each bloc maintains certain defensive positions that limit the other from exercising its comparative advantages. Capital flows between the two countries, especially long-term foreign direct investments remain underwhelming.

This scenario promises to be changed with the new EU-Mercosur trade agreement (Brussels, 1st of July 2019) which is subject to the final transcription into the texts and the respective market access offers.

The agreement will foster extensively the trade of goods, with Mercosur aiming to fully liberalize 91% of its imports from the EU over a transition period of up to 10 years for most products.

The EU will in turn liberalize 92% of its imports from Mercosur over a transition period of up to 10 years. Regarding tariff lines, Mercosur will fully liberalize 91% and the EU 95% of lines in their respective schedules.

Moreover, the agreement will offer EU industries cheaper high-quality raw materials by reducing or eliminating duties that Mercosur currently imposes on exports to the EU of products. It prohibits import and export price requirements and import and export monopolies, too. The document also contains strong provisions prohibiting export subsidies and measures with equivalent effect to

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ensure fair competition in trade between the EU and Mercosur. Last, but not least, the agreement provides a set of modern rules of origin that will facilitate trade flows between the EU and Mercosur. They will allow exporters and importers on both sides to benefit from the tariff reductions under the agreement and are in line with EU practice.

Finally, it recognizes the importance of customs and trade facilitation on trade relations and in the evolving global trading environment.

On the one hand, the EU and Mercosur will apply modern and automated procedures for the efficient and expedited release of goods, resorting to risk management and prearrival sending of documentation in order to speed up clearance. On the other hand, it is important that effective procedures will be applied as well to solve difference of views in order to ensure the effective implementation of the agreement.

The dispute settlement according to the new EU-Mercosur Trade Agreement is geared towards guaranteeing the successful implementation of the agreement. The mechanism has the potential to be an appropriate, effective, transparent and efficient means to guarantee enforcement and compliance of the countries with the obligations of the agreement. Analyzing the Dispute Settlement chapter, the EU will be able to challenge measures of individual Mercosur countries while at the same time any dispute between the countries regarding interpretation or application of the trade part of the agreement also can be solved.

The Dispute Settlement mechanism works as follows with regards to panel procedures: Either of the member states can use it if it considers that the other Party has failed to comply with one or more obligations under the trade part of the agreement. Companies can benefit from this mechanism as it brings them as investors legal certainty.

Firstly, a mere consultation is possible in order to find an amicable resolution of the dispute. Secondly, if consultation fails, the complaining Party may request the institution of an arbitration panel composed of 3 arbitrators experienced in international trade law. Annexed to the Dispute Settlement chapter of the EU-Mercosur Trade Agreement will be a code of conduct with ethical standards required for the necessarily impartial and independent arbitrators. Furthermore, a provision to select arbitrators among pre-agreed rosters ensures that the defendant party in a dispute cannot block the institution of a panel for reasons of disagreement in respect to the choice of the arbitrator.

One of the most important parts of the Dispute Settlement of the EU-Mercosur Trade Agreement is the transparency. Every person cannot only participate at the hearing, but also actively make his own submission to the panel. This stands in contrast to the arbitration in private commercial business which is confidential.

There is no appeal to the panel's report which must be considered as binding and final. This report obliges the infringing party to comply with the agreement. If the party does not manage to do so, the plaintiff can put in place countermeasures. Besides panel procedures, there will be also a mediation procedure which the parties can use in mutual consent at any time in order to find a friendly solution by means of a mediator. This can happen before a party starts with the dispute procedure, but also in parallel to panel proceedings.

As a conclusion, the mechanism for the purposes of resolving any dispute between the countries is of great importance as it will improve and protect the relationship between the foreign investors because it gives the countries involved in the business a tool to defend themselves and to reduce outstanding trade barriers. As there is a common field between the countries in terms of economic and political strategies, it should be focused on this common denominator. This focus is only possible with the help of a framework for eventual upcoming controversies.

Only with a dispute settlement mechanism between the countries with common denominator the relationship between them can be developed rapidly and in the interest of the respective member states and their investors. Consequently, the dialogue between the countries – on all levels, meaning between governments, institutions and investors – about commerce, technology and other important political subjects can become increasingly viable and new mutually beneficial agreements can be made.

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Civil Compensation Claim Arising Out of Contract is Time-Barred by Ten-Year Statute of Limitations

A. Historically

In Brazil, like in many other countries, the statute of limitations is the period of time within which an action can be taken on a legal question. As such, the definition of the statute of limitations is essential to give society legal security as to how long the citizen or legal entity must keep documents that might be used as evidence in order to safeguard its own rights in a potential future claim.

The Brazilian Civil Code of 1916 had a general rule distinguishing between personal actions and property actions, with thirty-year and ten-year statute of limitations, respectively (art. 177 combined with art. 179).

When the new Brazilian Civil Code of 2002 entered into force, it brought innovations, drastically reducing the statute of limitations and further listing several situations with their specific periods of time. It further maintained a general rule that "the statute of limitations will be of ten years when the law has not fixed a shorter term" (art. 205).

Since then, if a certain claim does not fit any of the situations listed in art. 206 and its paragraphs (Civil Code 2002), the ten-year general rule is the applicable one.

For many years, the Superior Court of Justice largely understood that the statute of limitations for actions seeking civil compensation based on contracts should be of ten years, grounded on the general rule set forth by art. 205 of the Civil Code of 2002.

This scenario changed in November/2006, when the Third Panel of the Superior Court of Justice modified its understanding so that the statute of limitations for civil compensation arising out of contract should be the same as for the civil compensation for extra-contractual liability (known, in the common law system as liability for tort), reducing it to **three years** (Special Appeal No. 1.281.594-SP). This decision was grounded on art. 206, §3, item V of the Civil Code of 2002, which defines as three years the period of time for a civil compensation claim based on tort to be served under pain of being statute barred.

From that moment on, a general insecurity emerged, because some of the Superior Court of Justice's decisions still accepted the ten-years as the period of time to serve a compensation claim resulting from a contract, while others established that the three-year statute of limitations should be the applicable one.

The turnaround came in June/2018, when the Second Section of the Superior Court of Justice decided that the statute of limitations to claim for compensation in connection with contract should be of ten years (Special Appeal No. 1.280.825/SP).

Despite it, there were still decisions in both directions (three years and ten years).

Finally, in May/2019, the Special Court of the Superior Court of Justice (highest instance within such Court), by deciding the appeal named *embargos de divergência,* which is a remedy available to the litigating parties whenever there is a divergence of decisions about the same matter in the same court, definitively settled the debate and, by seven votes against five, consolidated the understanding that the statute of limitations for the civil compensation resulting from contract is of **ten years** (Special Appeal No. 1.281.594-SP).

B. Grounds for the Superior Court of Justice's decision

The main arguments that sustained the Superior Court of Justice's decision were, in summary, the following:

i. The expression "civil compensation" (***reparação civil***), which is time-barred in **three years,** refers to extra-contractual illicit ("tort"), because that same language is used again only in Title IX, Book I, Special Part of the Civil Code of 2002, which governs the extra-contractual illicit ("tort"). Example: A car accident that causes damages that must be repaired.

ii. The obligation to indemnify has an accessory nature and results from the default of a previous main obligation. As such, while the right to claim the specific execution of the main obligation is not time-barred, the right to claim compensation for its default cannot be subject to a shorter statute of limitations. So, it is not logical to attribute different periods of time to claim for the execution of the obligation and to claim for damages resulting from its default.

C. Conclusion

In conclusion, the statute of limitations has as main purpose to grant certainty to the legal relations, pursuing stability, as it would not be socially affordable to support an endless situation of insecurity.

This decision from the Superior Court of Justice, which became final and unappealable on June 24, 2019 *(res judicata)*, can be seen as a progress, now harmonizing the understanding about the ten-year statute of limitations to seek for civil compensation arising out of contract, unless a different term is specified by the law, giving security to the legal relations.

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For the companies and entrepreneurs, which, in the past years, hesitated as to how long they should keep documentation to be used in a potential future claim based on contract, now this uncertainty has finally been judicially settled in ten years. It is worth mentioning, besides, that the statute of limitations is triggered with the default of the obligation and not necessarily with the termination of the contract.

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MP 881/2019: The New Single-Member Limited Company

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Provisional Presidential Decree no. 881, of April 30, 2019 ("**MP 881**"), recently approved by the National Congress and pending presidential sanction, entitled "Declaration of Economic Freedom Rights" introduced various modifications to legal provisions with the objective of simplifying and making less bureaucratic certain business procedures. Among these, special attention should be given to the amendment to the Civil Code including the possibility of incorporating a limited company by one or more persons, creating the concept of a single-member limited company.

Relaxation of the rules governing limited companies in order to allow just one partner meets a widespread and long-standing demand of the market and may have the effect of abolishing the figure of the "fictitious partner", that is, a partner with a symbolic holding only to comply with the requirement for a plurality of partners under the earlier text. By way of example, a study carried out by the Getúlio Vargas Foundation (FGV) in 2014 reveals that 22.45% of *limitadas* had a controlling partner who held more than 99% of the equity capital[1].

It should also be mentioned that, prior to MP 881, with the enactment of Law no. 12.441, of July 11, 2011, an individual entity with limited liability had been created, called an "EIRELI", set up by a single person and which could not be considered a partnership, but rather a legal entity sui generis subject to the subsidiary application of the provisions governing *limitadas.* Moreover, an EIRELI requires a minimum capital duly paid up at the moment of its constitution or increase, in an amount equivalent to at least 100 minimum salaries (R$ 99.800,00 as of today's date). It is also forbidden for individual persons to hold more than one entity of this type.

On the other hand, a single-member limited liability company does not require a minimum capital and the rules governing the payment up of the capital are flexible. There is also no restriction in the law as to the number of single-member companies that a person may hold. As a result, the EIRELI, since there are more requirements for its formation and limitations on its use, may possibly become less attractive and may fall into disuse, being widely substituted by the single-member company. In any case, it is important to point out that an EIRELI already in existence may be transformed into a single-member company, if this is better suited to its business model.

[1] https://direitosp.fgv.br/sites/direitosp.fgv.br/files/arquivos/anexos/radiografia_das_ltdas_v5.pdf

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We may conclude, therefore, that if the measure is sanctioned by the President, the possibility of forming a single-member limited company will facilitate the development of business activities in cases of sole proprietorship, and will result in greater legal security, since it is no longer necessary to include a second partner merely to comply with the rules applicable to a normal *limitada.*

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Disregard of Corporate Entity In the Provisional Measure No. 881/19

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One of the subjects that has been generating many expectations in the Brazilian market is the enactment of the provisional measure No. 881/19 ("PM 881/19"), also known as the PM of the Economic Freedom. After the approval of the PM's text by the Senate, on August 21, 2019, the last step is the presidential approval for the measure to enter into force – which is very likely to happen, considering that it was an initiative of the Government and that is aligned with the policies proposed by the new leaders of the Ministry of Economy.

As pointed out by the Ministry of Economy, the purpose of the provisional measure is to ensure a free trade policy, based on the principles of freedom in the exercise of economic activities, the assumption of good faith of the private initiative – notably the figure of the entrepreneur – and the subsidiary and exceptional intervention of the State in the market.

Among the many innovations brought by the legal text in reference, one of the main incentives for the economic agents, foreign and domestic, to engage in an activity in the country were the changes in the legal institute of the disregard of the corporate entity.

Accordingly, with the objective of increasing competitiveness of Brazil before the international community with the attraction of foreign investments, the PM 881/19 altered the wording of Article 50 of the Civil Code, with the insertion of five new paragraphs to it, setting clearer and more precisely, the criteria for the application of the disregard of corporate entity, as we shall see below.

Under the new rules, it was reinforced the concept that the corporate entity should not be confused with its partners, members, founders or administrators, noting that the autonomy of assets of the legal entities is a lawful instrument of allocation and segregation of risks.

In short, the changes cover the following aspects: (i) need for proof of fraudulent intent and personal benefit of the partners and/or administrators for the purposes of piercing the corporate veil; (ii) definition of the concept of misuse of the corporate entity and commingling of assets between the company and its partners or administrators, which earlier allowed some discretion of judges; and (iii) provision that the mere existence of an economic group shall not lead to the disregard of the corporate entity, by requiring proof of misuse of the corporate entity and commingling of assets.

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In view of the above, the private property and assets of the partners and administrators can only be seized by judicial decisions against the company in case of abuse of corporate entity, i.e. with the intentional use of the corporate entity aiming at harming creditors or practicing illicit acts for obtaining personal benefits. Thus, the only risk of partners and administrators losing their assets is in a situation where they have benefited directly or indirectly by such abuse, so that the corporate entity is not used disproportionately.

With regard to the definition of the concepts of misuse of the corporate entity and commingling of assets, the objective of the PM 881/19 is to bring more precision and legal certainty in the enforcement of the concept by the courts. Aligned with the first pillar, the misuse of the corporate entity has been defined as an "intentional use" of the corporate entity with the purpose of harming creditors and to the practice of illicit acts of any nature and the commingling of assets has been defined as the "actual absence of separation between the assets of the company and the private property of the partners or administrators", being characterized by repetitive fulfillment of partner's or administrators' personal obligations with the capital of the company, and vice versa.

Strengthening the character of encouraging the business environment, the PM 881/19 allows investment funds to limit the liability of its investors to the value of their investment and establishes that the responsibility of the administrators of investment funds shall not be joint with each of the providers of fiduciary services. Going beyond, the legal text also exempts administrators, responsible for choosing the risks and for managing the investments, for being liable for the obligations of the fund, except in cases of fraud or bad faith.

Following in the environment of the investment funds, when the provisional measure was voted in the National Congress, it was included the permission for creation of differentiated classes of shares with different rights and obligations and net worth separate from other assets, a measure that will protect the investors from the obligation to assume themselves liabilities of the fund.

The disregard of corporate entity follows its role of protecting the society and the creditors against potential abuses arising from the protection of the corporate veil granted to the entrepreneurs. So much so, that the PM 881/19 also introduced in the Bankruptcy Act (Law No. 11,101/05) the Article 82-A, which admits the possibility of applying the effects of disregard of corporate entity in bankruptcy, when the requirements of Article 50 of the Civil Code are verified.

Despite the objectivity brought by the new legal text, only time and actual application of the law can strengthen the effectiveness of these new rules. One of the matters in which the jurisprudence shall be very important is the assessment of the proofs, which will still be subject to the discretion of the judges.

Anyway, the perspective of the increased protection to the investor's capital shall encourage the entry of new players in the domestic market, fostering the incorporation and development of companies in the country, taking into consideration that one of the main barriers to the economic development of new companies in Brazil is the risk.

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