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Streitbeilegung im neuen EU-Mercosur Handelsabkommen

Deutschland und Brasilien sind daran interessiert, rasch zwischen ihnen einen Freihandelsdialog zu entwickeln, da zwischen ihnen viele wachsende Möglichkeiten für fruchtbaren bilateralen Handel und Investitionen bestehen.

In Bezug auf die komparativen Vorteile entspricht die Liste der Rohstoffe, die Brasilien exportiert, genau den Bedürfnissen und der Knappheit Deutschlands. Umgekehrt können deutsche Hersteller, die auf High-End-Technologie und wissensbasierte Waren spezialisiert sind, sowohl in der aufkeimenden brasilianischen Mittelschicht als auch im Business-to-Business-Handel mit brasilianischen Partnern eine wachsende Verbraucherbasis finden. Brasilien scheint, was Investitionen angeht, für die deutschen Bauunternehmer und Dienstleister ein Hauptziel zu sein. Brasilien ist bekanntlich mit einem Infrastrukturdefizit konfrontiert, während deutsche Unternehmen in diesem Bereich eine herausragende Stellung erreicht haben. Für deutsche Unternehmen können Investitionen in diesem Sektor in Brasilien Renditen bringen, die es in Kontinentaleuropa nicht gibt.

Dennoch hat die Beziehung noch nicht ihr volles Potenzial erreicht, da die Politik die Handelsausweitung gebremst hat. Die Mitgliedschaft Brasiliens im Mercosur-Handelsblock und die Mitgliedschaft Deutschlands in der Europäischen Union haben die Fähigkeit der Länder beeinträchtigt, ein bilaterales Handelsabkommen weiterzuleiten, da jeder Block bestimmte Verteidigungspositionen innehat, die den anderen davon abhalten, seine komparativen Vorteile zu nutzen. Die Kapitalflüsse zwischen den beiden Ländern, insbesondere die langfristigen ausländischen Direktinvestitionen, sind nach wie vor unzureichend.

Dieses Szenario soll mit dem neuen Handelsabkommen EU-Mercosur (Brüssel, 1. Juli 2019) geändert werden, das der endgültigen Umsetzung in die Texte und die jeweiligen Marktzugangsangebote unterliegt.

Das Abkommen wird den Warenhandel umfassend fördern, wobei der Mercosur darauf abzielt, 91% seiner Einfuhren aus der EU über einen Übergangszeitraum von bis zu 10 Jahren für die meisten Produkte vollständig zu liberalisieren. Die EU wird ihrerseits 92% ihrer Importe aus dem Mercosur über einen Übergangszeitraum von bis zu 10 Jahren liberalisieren. In Bezug auf die Tariflinien wird der Mercosur 91% und die EU 95% der Linien in ihren jeweiligen Fahrplänen vollständig liberalisieren.

Darüber hinaus wird das Abkommen der EU-Industrie billigere hochwertige Rohstoffe anbieten, indem Zölle gesenkt oder beseitigt werden, die der Mercosur derzeit für die Ausfuhr von Produkten in die EU erhebt. Es verbietet Import- und Exportpreisanforderungen sowie Import- und Exportmonopole. Das Dokument enthält auch strenge Bestimmungen zum Verbot von Exportsubventionen und Maßnahmen gleicher Wirkung zur Gewährleistung eines fairen Wettbewerbs im Handel zwischen der EU und dem Mercosur. Last but not least enthält das Abkommen eine Reihe moderner Ursprungsregeln, die die Handelsströme zwischen der EU und dem Mercosur erleichtern. Sie werden es Exporteuren und Importeuren auf beiden Seiten ermöglichen, von den im Rahmen des Abkommens gewährten Zollsenkungen zu profitieren, und stehen im Einklang mit der EU-Praxis. Schließlich wird die Bedeutung von Zoll- und Handelserleichterungen für die Handelsbeziehungen und das sich entwickelnde globale Handelsumfeld anerkannt.

Die Streitbeilegung nach dem neuen Handelsabkommen EU-Mercosur soll die erfolgreiche Umsetzung des Abkommens sicherstellen. Der Mechanismus kann ein geeignetes, wirksames, transparentes und effizientes Mittel sein, um die Durchsetzung und Einhaltung der Verpflichtungen aus dem Abkommen durch die Länder sicherzustellen. Durch die Analyse des Kapitels über die Beilegung von Streitigkeiten wird die EU in der Lage sein, Maßnahmen einzelner Mercosur-Länder in Frage zu stellen, während gleichzeitig Streitigkeiten zwischen den Ländern über die Auslegung oder Anwendung des handelspolitischen Teils des Abkommens beigelegt werden können.

Der Streitbeilegungsmechanismus funktioniert in Bezug auf Panelverfahren wie folgt: Einer der Mitgliedstaaten kann ihn anwenden, wenn er der Ansicht ist, dass die andere Vertragspartei gegen eine oder mehrere Verpflichtungen aus dem Handelsteil des Abkommens verstoßen hat. Unternehmen können von diesem Mechanismus profitieren, da er ihnen als Anleger Rechtssicherheit bringt.

Erstens ist eine bloße Konsultation möglich, um eine gütliche Beilegung des Streits zu finden. Zweitens kann die beschwerdeführende Partei bei fehlgeschlagener Konsultation die Einsetzung eines Schiedsgerichts beantragen, das sich aus drei Schiedsrichtern mit Erfahrung im internationalen Handelsrecht zusammensetzt. Dem Streitbeilegungskapitel des Handelsabkommens EU-Mercosur wird ein Verhaltenskodex mit ethischen Standards beigefügt, die für die notwendigerweise unparteiischen und unabhängigen Schiedsrichter erforderlich sind. Darüber hinaus stellt eine Bestimmung zur Auswahl von Schiedsrichtern unter vorab vereinbarten Dienstplänen sicher, dass die in einem Rechtsstreit stehende Partei die Einsetzung eines Gremiums aus Gründen der Meinungsverschiedenheit hinsichtlich der Wahl des Schiedsrichters nicht blockieren kann.

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Einer der wichtigsten Teile der Streitbeilegung des Handelsabkommens zwischen der EU und dem Mercosur ist die Transparenz. Jede Person kann nicht nur an der Anhörung teilnehmen, sondern auch aktiv eigene Beiträge an das Panel einreichen. Dies steht im Gegensatz zu dem Schiedsverfahren im privaten Handelsgeschäft, das vertraulich ist.

Der Bericht des Panels ist nicht als verbindlich und endgültig anzusehen. Dieser Bericht verpflichtet die verletzende Partei, die Vereinbarung einzuhalten. Gelingt dies der Partei nicht, kann der Kläger Gegenmaßnahmen ergreifen. Neben Panelverfahren wird es auch ein Mediationsverfahren geben, das die Parteien jederzeit einvernehmlich nutzen können, um mittels eines Mediators eine einvernehmliche Lösung zu finden. Dies kann geschehen, bevor eine Partei mit dem Streitverfahren beginnt, aber auch parallel zum Panelverfahren.

Als Fazit ist der Mechanismus zur Beilegung von Streitigkeiten zwischen den Ländern von großer Bedeutung, da er die Beziehung zwischen den ausländischen Investoren verbessert und schützt, zumal er den an dem Geschäft beteiligten Ländern ein Instrument zur Verteidigung und zur Reduzierung der ausstehenden Beträge bietet. Da es zwischen den Ländern ein gemeinsames Feld in Bezug auf wirtschaftliche und politische Strategien gibt, sollte es auf diesen gemeinsamen Nenner ausgerichtet sein. Diese Fokussierung ist nur mit Hilfe eines Rahmens für eventuell anstehende Kontroversen möglich.

Nur mit einem Streitbeilegungsmechanismus zwischen den Ländern mit gemeinsamem Nenner kann das Verhältnis zwischen ihnen schnell und im Interesse der jeweiligen Mitgliedstaaten und ihrer Investoren entwickelt werden. Infolgedessen kann der Dialog zwischen den Ländern - auf allen Ebenen, dh zwischen Regierungen, Institutionen und Investoren - über Handel, Technologie und andere wichtige politische Themen immer praktikabler werden und es können neue Abkommen zum gegenseitigen Nutzen geschlossen werden.

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IBAMA starts public consultation on offshore wind farms

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The framework for the environmental licensing of offshore wind farms is in public consultation phase, started by IBAMA (the federal environmental agency) on January 6th. Brazilian environmental law sets forth that IBAMA is the competent authority for the environmental licensing of offshore wind farms.

Through this public consultation, IBAMA will collect opinions, suggestions and contributions in relation to the Reference Term ("TR") that will establish the guidelines for the Environmental Impact Assessment and the respective Environmental Impact Report (called "EIA/RIMA"), which will support the licensing procedure of offshore wind farms.

Until April 9th, IBAMA expects to receive contributions from interested parties to improve the licensing framework. Instructions and forms for participating in the consultation are available at IBAMA's website[1].

The subject-matter has been analyzed by the abovementioned environmental agency for quite some time, being intensified last year, after the International Workshop on Environmental Impacts Assessment of Offshore Wind Farms, which took place on the 2nd and 3rd of July 2019, in partnership with the European Union.

Based on the experiences and knowledge shared by the specialists participating in the aforementioned event, in August 2019 IBAMA prepared the Technical Note N. 2/2019/NLA-RS/DITEC-RS/SUPES-RS, which enabled the conception of the TR.

In addition, the environmental agency plans to conduct an internal training course for the agents responsible for the environmental licensing procedures, as well as the drafting of a Normative Instruction that sets out the technical guidelines for the development of offshore wind farms in Brazil.

The draft of a TR with specific guidelines for environmental assessments and the definition of clear next steps to overcome regulatory gaps certainly represent a great progress for the wind power generation sector.

There is still much to be clarified and defined, but the public consultation represents a trend by Brazilian regulators in providing greater legal certainty for

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[1] https://www.ibama.gov.br/consultas-publicas/2105-ibama-realiza-consulta-publica-sobre-termo-de-referencia-para- elaboracao-de-estudos-de-impacto-ambiental-de-complexos-eolicos-marinhos

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entrepreneurs and investors, more transparency on the efforts that should be made in environmental licensing, as well as in enabling the development of the offshore generation market.

This trend is also observed on other fields. It is worth highlighting that offshore energy generation has also been addressed in debates related to the decommissioning of oil and gas exploration and production facilities. The review of the decommissioning rules was subject to a public hearing on January 8th, after a public consultation started by the ANP (the federal oil and gas regulatory agency). Through the Public Consultation Nr. 24/2019, ANP seeks to review its Resolutions Nrs. 27/2006, 28/2006 and 25/2014. Similarly, technical discussions and workshops paved the way to the ongoing review.

One of the main points of attention in the discussions related to the decommissioning of offshore activities concerns the possibility of maintaining the structures on the high seas and the definition of the complete removal of structures as a general rule. Amongst the alternatives for the maintenance of structures, the implementation of offshore wind farms in decommissioned oil and gas areas has been envisioned as a possibility.

ANEEL (the federal energy regulatory agency) has already indicated that, in order to allow the proper evolution of offshore wind farms in Brazil, modern regulation will be needed, one that supports innovation and leads to the development of this technology. Therefore, ANEEL is, together with IBAMA, EPE (the Brazilian energy research company) and other relevant entities and authorities, seeking to improve regulation, allowing the sustainable development of offshore wind energy generation in the country[2].

For further information on the matter and other environmental and regulatory questions, please contact our team.

[2] https://www.aneel.gov.br/sala-de-imprensa-exibicao-2/-/asset_publisher/zXQREz8EVlZ6/content/aneel-participa-de-divulgacao-oficial-de-estudo-sobre-eolicas-offshore-no-ibama/656877?inheritRedirect=false

Taxation on Foreign Currency Hedging

Brexit, USA-China trade wars, coronavirus, a possible war in Iran – as well as all instabilities in global trade – inevitably put pressure on exchange rates, and therefore expose global operators to risks of currency exchange fluctuation.

On one hand, the appreciation of foreign currency may increase expenses to companies with liabilities in said currency. On the other, devaluation may reduce profits for those with receivables parameterized in said currency. Both scenarios impact the bottom line due to elements beyond companies' control.

To avoid these unwanted effects, agents in global trade have increasingly turned to currency derivatives for hedging purposes. Call or put options, swaps, future contracts, and forward contracts are quite easily acquired in Brazilian OTC-markets or by means of a financial institution.

All of these imply, in some effect, the purchase, sale or swap of currency at a set rate in the future, and sometimes by the counterpart of a fixed price. Their purpose is to ensure baseline profit – or at least annul losses – and enable the draft of a predictable cash flow.

Brazilian law has determined that, for a derivative to be considered with hedging purposes – rather than a speculative scope –, it must comply with the following conditions (1) protect rights or liabilities, (2) be related to its operational activities.

There is some controversy if these conditions should both be met to ensure the transaction's hedging nature or if meeting one of them would be enough. Brazilian tax authorities tend to claim both conditions.

Despite these restrictive reading, it is important to note that the Administrative Tax Court of Appeals ("CARF") has broadened the criteria to establish that the hedged right or liability does not necessarily have to be registered in the company's accounting books. The highly likelihood of an asset or debt to materialize in the future is enough cause to structure a hedge and mitigate exchange risks.

Companies must, therefore, prove (1) the necessity of hedging – existence of items and values exposed to foreign exchange risk, risk management processes and methodologies –, and (2) the suitability of the derivative to hedge that particular item, i.e. correlation, at the date of hiring, between hedge price variations and expected returns from the hedged items.

If companies fail to prove these elements, which demonstrate the hedge's effectiveness, the derivate shall be considered speculative by the tax authorities.

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This is especially important considering that, depending on their purpose, whether speculative or for hedging, derivatives are subject to different tax regimes.

Some similarities in taxation can be found, such as the 0.005% withhold income tax, the so-called "snitch" taxation (*"dedo-duro"*), which incurs in payments arising from both speculative and hedging derivatives. The purpose of the *"dedo-duro"* is making tax authorities aware that a derivative operation took place, and that there may be gains subject to taxation.

However, there seem to be more differences than similarities between the regimes. Three of them deserve to be highlighted.

The first one regards the possibility of offsetting losses with taxable income. While losses on hedge transactions may be unlimitedly offset against operational gains, speculative transactions face some limitations. Their losses can only be offset against gains obtained with other speculative derivates. This may cause a derivative loss carryforward, even if, at the same time, taxable operational income arises.

The Administrative Tax Court of Appeals ("CARF"), however, has already established that this limitation applies only to *"Imposto de Renda"*, one of the Brazilian corporate income taxes (levied on approximately 25%), but it does not affect the appraisal of the second Brazilian income tax, the so-called *"Contribuição Social do Lucro Líquido"* (9%).

The second difference lies upon the calculation of monthly income taxation. While gains in hedging derivatives are taxed amongst with the general taxable income at the rate of approximately 34%, providing profit occurs; gains in speculative transactions are taxed separately at a 15% rate, regardless if there is operational profit or loss.

In both cases, all income must be submitted to a 34% taxation at the end of the tax year, and the monthly taxation is considered tax anticipation. Nonetheless, the different rates on monthly taxation (34% for hedging and 15% for speculative derivatives) may impact cash flow and should be considered upon the hedge's structuring.

The third difference refers to the social security contributions "PIS" and "COFINS", both levied on revenues. As of 2015, speculative derivatives are levied by these contributions at the cumulated rate of 4.65%, whereas hedging transactions are tax-exempt.

Basically, as hedging transactions become commonplace in cross-border operations, some caution is recommended. Since the Brazilian tax authorities can charge tax differences from the past five years, it is important to keep documents that prove the correct nature of the derivative, to promptly present them upon request, and ensure the envisaged tax regime.

Project for Change of the Regulatory Framework for Sanitation

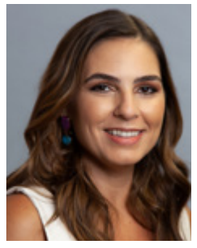
According to data released in 2018 by the National Information System on Sanitation (SNIS), in the last Diagnosis of Water and Sewage Services, currently 35 million Brazilians do not have access to drinking water and only 53.2% of the population has access to sewage collection.

In view of this scenario, Bill of Law 4162/2019 (PL 4162/19) intends to change and update the Regulatory Framework for Basic Sanitation. This project stands as an important promise to change the rules established for basic sanitation services, which include water supply, sewage treatment, the destination of rainwater in cities, and urban waste. PL 4162/19 was approved by the Chamber of Deputies and is currently under analysis by the Federal Senate.

One of the main implementations proposed with the new regulatory framework is the incentive to private investment in this sector, which today is highly monopolized (state-owned companies, as a rule owned by the respective states, have a strong predominance and private initiative is present in few municipalities). PL 4162/19 intends to include provisions that encourage the privatization and capitalization of state-owned companies in the sector, including making it possible to increase the participation of the capital market to finance sanitation projects.

Additionally, in order to overcome the current basic sanitation model in the country, PL 4162/19 intends to guarantee the progressive expansion of access to drinking water supply and sewage collection services for all households in the country. To make such universalization possible, PL 4162/19 reinforces the need for the government to establish solid partnerships with the private sector, with the support of states and municipalities.

If PL 4162/19 is approved, the states would be able to create blocks of municipalities. This measure aims to promote the meeting, in blocks, of municipalities with different financial resources, promoting the regionalization of basic sanitation and aiming to make smaller cities more attractive for investments by the private sector. The states will organize the blocks based on the analysis of their economic and financial sustainability, and the municipalities will be able to join this modality, voluntarily. The federal government will intervene only if the states failed in the organization.



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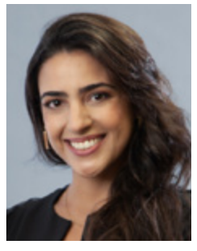

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One of the strong characteristics of this proposal to change the regulatory framework is the concern with the economic and financial sustainability of the municipalities. For this purpose, there is provision in PL 4162/19 in the sense that public water supply, sewage, drainage, solid waste management, and urban rainwater management services may be remunerated by the collection of fees, tariffs and other public prices, according to the service provision regime or their activities.

In this same sense, it is important to highlight that PL 4162/19 intends to eliminate the so-called "Program Contracts", which are contracts executed between municipalities and state-owned sanitation companies and that neither follow the formal administrative bidding procedure, nor provide for targets. This is intended to facilitate partnerships with the private sector and favor Concession Contracts through competition, which are generally more efficient in financial terms for all parties involved.

To provide investors with greater legal certainty, the Concession Agreements must observe the reference standards for the regulation of basic sanitation to promote the adequate provision of services, with full service to users, complying with the principles of regularity, continuity, efficiency, security, timeliness, generality, courtesy, low tariffs, rational use of water resources, and universal service.

It should also be noted that, regarding the resolution of disputes in the scope of the Concession Contracts mentioned, PL 4162/19 establishes that the contracts that involve the provision of basic sanitation services may provide for private mechanisms to resolve disputes arising from or related to the contract , including arbitration, so that *"National Water Agency (ANA) will make available, on a voluntary basis and subject to agreement between the parties, mediation or arbitration action in conflicts involving titleholders, regulatory agencies, or providers of basic sanitation services"* (article 4-E, Paragraph 5 of the Bill). However, the Agency is far from acting as a dispute resolution forum.

It is also intended to give the ANA the competence to edit reference standards on the service, to provide guidelines to local agencies and municipalities, with due regard for the plurality and geographic extent of the country, which holds 12% of the fresh water on the planet. As per PL 4162/19, ANA would be entrusted with the functions of promoting studies and research to reduce water losses that cause huge damage to basic sanitation operators, as well as establishing methods to calculate indemnities in situations of sale and regulating rules for reuse of effluents, among other attributions.

Finally, it should be highlighted that the current wording of PL 4162/19 also intends to (i) abolish the current limit of R$ 180 million of participation of the federal government in funds to support the structuring of public-private partnerships, in order to mitigate risks imminent to public-private partnership projects in Brazil; and (ii) establish deadlines for municipalities to close open dump yards by 2024, depending on the location and size of the municipality.

In summary, although the challenges are many, the New Sanitation Regulatory Framework is not only an attempt to expand water and sewage coverage throughout the national territory, but also imposes itself as a public health issue and a way to bring private initiative closer to this line of business, ensuring more security to activities and enabling better service to the population.

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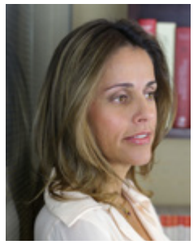

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Considerations concerning the criminalization of declared but unremitted State vat ("ICMS")

On December 18, 2019, a majority of the justices on the Brazilian Federal Supreme Court ("STF"), sitting *en banc*, ruled as follows: "Taxpayers who routinely fail to remit the State VAT ('ICMS')[1] they charge to purchasers of merchandise or services, with the intent to appropriate the same for themselves, fall within the definition of the criminal violation described in art. 2, sec. II, of Law nº 8,137 (1990)"[2]. This decision came in the context of the judgment of Ordinary Habeas Corpus Appeal nº 163,334/SC, with Justice Roberto Barroso writing the opinion for the court. That opinion confirmed the prior consolidated understanding of the Brazilian Federal High Court of Justice ("STJ").

In order to better understand the decision, it should be recalled that art. 2, sect. II, criminalizes the conduct of "within the period stipulated, failure to remit the amount of the levy or social contribution tax *deducted* or *charged* in the capacity of the party subject to said obligation and which should be remitted to the public treasury". Different from other violations provided for in the same law, in which tax evasion presupposes tax fraud, this provision is more like that of unjust enrichment. Thus, in order to be considered a crime, it must be confirmed that the amount of the levy was in fact deducted from or charged against a third party and that said amount was not passed on to the public purse.

Following this logic, the understanding that had prevailed in the higher courts was that only the ICMS due under a taxpayer substitution (*"substituição tributária"*) regime could meet that requirement because, under such a regime, the amount of the levy may be discounted directly from the taxpayer and not subsequently passed on to the treasury, thereby constituting unjust enrichment.

In other words, in the decision mentioned above, the Brazilian Federal Supreme Court broadened the scope of the crime in question to also include those cases in which ICMS is not remitted in the context of a taxpayer's own operations. The rationale for this change is in the fact that, in such a case, the direct taxpayer, such as a manufacturer, charges the subsequent purchaser in the productive chain for the amount of the tax by adding the value of the ICMS owed to the sale price. Proceeding thusly throughout the chain of production, the final amount of the levy is eventually paid by the final consumer as an amount embedded in the price of the product.

The fact is, however, that, different from ICMS under a taxpayer substitution regime, the primary taxpayer himself declares the value of the levy and is responsible for remitting it to the treasury in direct operations. Though the amount of the tax is included in the final price of the product (just as other expenses, levies, and the profit margin of the seller are), the final consumer is not the taxpayer with respect to the treasury. This is precisely why the understanding had always been that, in the case of direct operations, failure to remit the tax owed amounted to taxpayer non-compliance, which seems to us the correct interpretation. To criminalize such conduct would amount to imprisonment for debt, a penalty not allowed under our legal framework.

The basis for this understanding is that the terms used in the text of the law, the *deduction* or *charging* of a levy, are associated with the concept of taxpayer liability and not with the mere passing on of the economic value of a tax already charged to a third party, such as the final consumer. Thus, it is not possible to argue that such a consumer was *charged* the value of the tax.[3]

Moreover, with respect to the expansion of the concept of the term charged to include the burdening of a third party – and one who is not a party to the taxpayer-treasury relationship – with the amount of the tax, it should be noted that the higher courts have established a condition for the imposition of the criminal penalty which is not provided for in law, that is, that the failure to remit the amount of the tax be routine. In other words, according to the decision, a one-time failure to remit the amount of ICMS due is not sufficient grounds to invoke the Penal Code, and such an omission should remain within the sphere of mere failure to comply with a tax obligation. However, by creating such a condition, the higher courts have created another degree of legal uncertainty as the concept of what constitutes routine behavior is far from clear and will certainly be the object of new court cases seeking to define its outer limits. This situation is even more worrisome in the case of ICMS taxpayers in arrears when one takes into consideration that, in the case that was before the STF, the failure to remit the tax occurred on a staggered basis (between the years 2008 and 2010), for a total of only eight months in which the tax was not remitted. That is, from the perspective of due respect for taxpayer rights, such omissions could not be called routine.

[1] State Value Added Tax ("Imposto sobre Operações de Circulação de Mercadorias e Prestação de Serviços de Transporte Interestadual e Intermunicipal e de Comunicação")

[2] The full text of the opinion was not yet available at the time of publication.

[3] In this regard, see the decision of Justice Maria Thereza de Assis Moura, of the STJ, in Special Appeal nº. 1,632,556/SC.

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In the case under analysis, one in which the tax due was fully declared though not remitted – in other words, the debt was fully acknowledged by the taxpayer – the Public Prosecutor's Office (*"Ministério Público"*) had to prove additional factors other than the mere routine nature of the omission in order to succeed with a criminal conviction. Among these additional factors we may highlight the need to prove the intent to defraud (the effective intent to not eventually remit the tax) and criminal authorship (identification of the party responsible for the non-payment of the tax), elements that a taxpayer may use in his defense to demonstrate the lack of the necessary elements to constitute the crime of which he is accused.

For all of the reasons discussed above, it is clear that the criminalization of ICMS due and declared but not yet remitted in a taxpayer's own operations has more to do with the eagerness of the treasure to collect the tax than with any coherent theory of law. It is an example of the state acting coercively against businesses which, fearful of the ills a criminal proceeding may entail, are more likely to pay the taxes owed in full in order to have the criminal charges dropped.

Finally, it remains an open question whether this new understanding may in some way establish a precedent for other cases of simple fiscal non-compliance to be likewise criminalized, given that the final price of a product to the consumer includes not only the amount of the ICMS previously charged, but also that of other levies on the business that produced it. Thus, it is the latest challenge of the corporate criminal law bar to see that this new, punitive understanding is eventually modified or reversed.

Der Vertrag „Verde e Amarelo" für Berufsanfänger nach der Präsidialverordnung MP Nr. 905/2019

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Am 11. November 2019 wurde in Fortführung der brasilianischen Arbeitsrechtreform die Präsidialverordnung (MP) 905/2019 veröffentlicht, die verschiedene Bestimmungen des brasilianischen Arbeitsgesetzbuchs ändert und eine neue Modalität des Arbeitsvertrages (*„Verde e Amarelo"*) regelt, um einen Anreiz für die Einstellung junger Menschen zwischen 18 und 29 Jahren zu schaffen, die zuvor noch nicht beruflich tätig waren.

Nicht als vorherige berufliche Tätigkeit gelten für die Charakterisierung als erster Arbeitsplatz einmalige Arbeiten, Gelegenheitsarbeiten, Lehrlingstätigkeiten und Probezeitverträge, d.h. Mitarbeiter der in der MP definierten Zielgruppe können vorher in dieser Form beschäftigt worden sein und trotzdem von der Maßnahme begünstigt werden.

Die Einstellung kann zwischen dem 1. Januar 2020 und dem 31. Dezember 2022 mit einer Höchstdauer von 24 (vierundzwanzig) Monaten erfolgen. Die Grenze des 31. Dezember 2022 gilt für Einstellungen, nicht für die Vertragslaufzeit. Das bedeutet, dass der Vertrag bis zum Dezember 2024 laufen kann, wenn die Einstellung im Dezember 2022 erfolgt.

Nach Ablauf der Höchstlaufzeit von 24 Monaten wird der Vertrag *„Verde e Amarelo"* im Einklang mit den bereits existierenden Vorschriften des Arbeitsgesetzbuchs CLT automatisch in einen unbefristeten Arbeitsvertrag umgewandelt.

Die hier behandelte Einstellungsmodalität gilt sowohl für Übergangsaktivitäten als auch für permanente Aktivitäten. Untersagt ist jedoch die Ersetzung regulär eingestellter Arbeitnehmer durch Mitarbeiter in dieser Vertragsmodalität. Die Modalität ist nur auf von Unternehmen neu geschaffene Arbeitsplätze anwendbar. Außerdem ist für einhundertachzig Tage ab Entlassung die Wiedereinstellung eines in anderen Modalitäten beschäftigten Arbeitnehmers untersagt. Dies gilt nicht für einmalige, gelegentliche Beschäftigungen, Lehrlinge oder Probezeitverträge.

Die Unternehmen können bis zu 20% ihrer Arbeitnehmer in dieser Vertragsmodalität beschäftigen. Unternehmen mit weniger als 10 Beschäftigten dürfen maximal 2 Arbeitnehmer in dieser Modalität einstellen.

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Bei Verstoß gegen diesen Prozentsatz werden diese Verträge unbeschadet anderer Verwaltungssanktionen durch Prüfer des Wirtschaftsministeriums unverzüglich in unbefristete Verträge umgewandelt. Untersagt ist schliesslich die Einstellung von Arbeitskräften, für die es Spezialvorschriften gibt.

Den in dieser Modalität eingestellten Mitarbeitern stehen alle in Verfassung, dem CLT und in Betriebs/Verbandstarifverträgen geregelten arbeitsrechtlichen Ansprüche zu, soweit diese nicht den hier behandelten Regelungen widersprechen.

Das Gehalt, das den jungen Mitarbeitern gezahlt wird ist beschränkt auf 1,5 Mindestgehälter (*„salário mínimo“*), d.h. auf R$ 1.567,50 bei Zugrundelegung des aktualisierten Mindestgehalts in Höhe von R$ 1.045,00. Am Ende jedes gearbeiteten Monats (oder anderen von den Parteien vereinbarten, obligatorisch unter einem Monat liegenden Zeitraums) hat der junge Mitarbeiter Anspruch auf die unverzügliche Zahlung des Gehalts, des anteiligen 13. Gehalts, des Urlaubsentgelts und des in der Verfassung vorgesehenen Urlaubsgeldes in Höhe von 1/3 des Urlaubsentgelts.

Die Unternehmen werden bei dieser Modalität der Anstellung vom Arbeitgeberanteil für die Sozialversicherungsabgaben, von der Abgabe an das System “S” und von der Ausbildungsabgabe befreit. Ferner wird der Satz für den Beitrag zum Arbeitslosenfonds (FGTS) auf 2% gesenkt.

Das auf die Beiträge an den FGTS anfallende Bußgeld im Falle einer Kündigung, das bei dieser Modalität 20% statt 40% beträgt, kann monatlich oder in einem anderen, von den Parteien vereinbarten Zeitraum, der zwingend kürzer als ein Monat sein muss, vorab gezahlt werden. Es fällt bei jeder Art von Kündigung an, einschließlich Kündigungen wegen schwerwiegender Verstöße gemäß Art. 482 CLT.

Die Arbeitszeit folgt der allgemeinen Regel. Überstunden sind ebenso erlaubt wie der Ausgleich von Stunden im selben Monat oder mittels eines individuellen Zeitkontos.

Im Fall der Kündigung des Vertrages *„Verde e Amarelo“* hat der Mitarbeiter Anspruch auf die kündigungsbedingt geschuldeten Beträge, sowie auf das Bußgeld des FGTS-Fonds und das Arbeitslosengeld, solange die gesetzlichen Voraussetzungen erfüllt sind.

Es ist darauf hinzuweisen, dass die vorzeitige Kündigung nicht zu einer Abfindung in Höhe der Hälfte des noch ausstehenden Zeitraums gemäß Art. 479 CLT führt und damit eine Ausnahme von der allgemeinen Regel für befristete Anstellungsverträge darstellt. Es ist allerdings möglich, eine Klausel aufzunehmen, die den Parteien das Recht zur vorzeitigen Kündigung einräumt.

Es handelt sich vorliegend nicht um den ersten Versuch einer brasilianischen Regierung, Anreize für die Einstellung junger Menschen zu schaffen. Es sei hier das „Programm Erster Arbeitsplatz“ (*Programa Primeiro Emprego*) genannt, das von der Regierung Lula geschaffen, später allerdings aufgegeben wurde, weil die Regierung anerkennen musste, dass die Politik der Subvention für die Schaffung von Arbeitsplätzen nicht wie gewünscht funktionierte, da zunächst die berufliche Qualifikation junger Menschen verbessert werden musste, um deren Einstellung zu stimulieren. Im Jahr 2005, noch während der Regierung Lula, wurde das Arbeitsgesetzbuch CLT durch das Gesetz 11.180 geändert, um die Altersgrenze für Auszubildende auf 24 Jahre zu erhöhen.

Die fehlende berufliche Qualifikation junger Menschen ist nach wie vor ein Problem, das auch in der hier behandelten MP anerkannt wird. Die MP räumt den in der Modalität „Verde e Amarelo“ eingestellten jungen Menschen insoweit Priorität ein. Die entsprechenden Richtlinien werden noch vom Wirtschaftsministerium ausgearbeitet.

Wir hoffen, dass der Versuch der Qualifikation und Einstellung junger Menschen diesmal die vom Gesetz angestrebten Wirkungen zeigt und die nach wie vor hohe Arbeitslosigkeit in dieser Gruppe der brasilianischen Bevölkerung reduziert wird.

*Autor der Publikationen ***So geht’s Ihr Einstieg in Brasilien***
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Job stability to pregnant employee in temporary labor agreement is denied by the Superior Labor Court

(i) The Temporary Labor Agreement:

Pursuant to Law No. 6,019/1974, amended by Law No. 13,429/2017, which governs the matter, "temporary work is the one rendered by an individual hired by a temporary work company that provides manpower to another company in order to meet the latter's transitional need to replace permanent personnel or the latter's complementary job demand".

In accordance with the applicable legislation, two situations allow the temporary work contract:

(i) the need to replace, in a transitory fashion, permanent manpower (e.g.: vacations or maternity-leave); or

(ii) to meet a complementary and extraordinary job demand.

The temporary workers have the same rights and labor conditions as the employees hired directly by the company that contracted the services. Besides, they have the same rights as the employees hired under the Consolidation of Labor Laws (Consolidação das Leis do Trabalho – CLT).

(ii) Pregnancy provisory job stability and the temporary labor agreement:

As a general rule, the labor laws assure job stability to the pregnant employee since the confirmation of the pregnancy until five months after the delivery (article 10, II, "b" of the Transitory Constitutional Provisions Act).

The Superior Labor Court, on its turn, issued Precedent No. 244, which ruled that even in the event the services were provided under an "employment agreement with definite term", the pregnant employee would be entitled to job stability pursuant to the already mentioned article 10, II, "b" of the Transitory Constitutional Provisions Act.

Although Precedent No. 244 expressly refers to "definite term", by analogy, the majority of the Judges and Regional Labor Courts understood that the "temporary contract" is a type of agreement with definite term and, as a consequence, their decisions usually granted job stability to the temporary pregnant employee.

Such understanding turned out to bring a huge legal insecurity to the companies that contracted temporary manpower to replace a certain and sporadic labor need and, suddenly, had to assume an unexpected labor liability arising out of the pregnancy of the employee providing the temporary work.

(iii) The decision of the Superior Labor Court Full Panel from November 18th, 2019:

On November 18th, 2019, aiming at harmonizing the jurisprudence about the matter, the Full Panel of the Superior Labor Court ("TST"), by majority of votes (16 x 9) decided that the pregnant employee that renders services under a Temporary Labor Agreement is not entitled to the job stability assured by 10, II, "b" of the Transitory Constitutional Provisions Act.

The decision was a landmark and, having been pronounced by TST Full Panel, it settled, once and for all, the controversy as to whether or not there is job stability for the pregnant employee in a temporary labor agreement.

The decision further clarified that Precedent No. 244 is applicable only to the labor agreements with definite term and not to the temporary ones.

The decision's prevailing argument is that the temporary labor agreement has a transitory nature, given that, since the very beginning of the contract, the employee is aware that the job is provisory, existing only while the situation that gave rise thereto remains and, yet, always limited to the maximum period allowed by the applicable law. Therefore, there are no expectations of being hired at the end of such period.

According to TST's understanding, there are no grounds to consider the dismissal, in those situations, as arbitrary and without cause, since, in general, the temporary agreement extinguishes once its term elapses.

Such characteristic differs the Temporary Labor Agreement from the Probational Labor Agreement, for instance, because in the latter the employee has expectations of being definitively hired when the probational period is over.

The decision pronounced by TST Full Panel is binding, which, in theory, should cause the Judges and Regional Labor Courts to decide in accordance with TST's current understanding.

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CONCLUSION

Given the particular characteristics of the Temporary Labor Agreement - which were not taken in consideration in the previous decisions that grounded Precedent No. 244 – the controversy around the recognition of the provisory job stability to pregnant employee hired under the provisions of Law No. 6,019/1974 ("temporary work") seems to have come to an end with the recent decision pronounced by TST, which dismissed the existence of such job stability and is binding upon the Judges and Regional Labor Courts. This is expected to finally bring legal security to the companies that need to contract temporary personnel.

Startup costs of investments in Brazil: debt-to-equity swap as an alternative approach

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Brazil is the hugest country in the southern hemisphere of the globe both in terms of size, population, natural resources, market and economy. Despite the country's longstanding problems associated with corruption and inefficiencies in terms of logistic and human resources, Brazil has always been perceived as an attractive investment destiny. Notwithstanding the increase of outbound investments made by remarkable Brazilian Multinational Enterprises (MNE) in the last few decades, Brazil is still a predominantly capital importing economy.

However, that scenario changed after the unprecedent political crisis that started in 2013 with the operation '*Lava Jato*' followed by an economic turmoil in the following years that drove away many investors.

This economic and political storm only started to lose momentum after several economic and labor law reforms were enacted by the Congress under the leadership of more liberal governments.

In this economic recovery scenario, Brazil is becoming attractive to international investors once again. Like in the past, many multinational enterprises (MNE) that are searching for ways to access Brazil's market started by opening business offices and subsidiaries in Brazil.

Many of these MNEs are not perfectly aware about how they can cover up starting up costs of their operation in Brazil. The lack of enough expertise about possible alternatives for investment in Brazil sometimes can lead to an irregular financial assets transfer, in which case such transfers are a liability for the parent company (shareholder) from the tax and corporate law aspect.

Commonly, foreign shareholders pays directly to service providers in Brazil to cover up starting operational costs, in situations where the subsidiary sometimes is not even formally incorporated in Brazil (i.e., the subsidiary does not have registration in the National Corporate Taxpayers Registry ("CNPJ") or an address in Brazil yet).

Such transfer of assets gives rise to a debt between the subsidiary (debtor) and the parent shareholder (creditor), raising tax and regulatory issues associated to the expenses refund.

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From regulatory perspective, such operations must be registered before the Brazilian Central Bank through the Electronic Declaratory Register - Financial Operations Registry (RDE – ROF) and Electronic Declaratory Register – Direct Foreign Investment (RDE – IED), otherwise such resources will be considered "Tainted Capital" with negative tax and corporate repercussion for the company.

From tax perspective, depending on the place of the service provided (whether foreign or domestic sources) taxes on the import of services may be triggered at the time the debt is paid.

Alternatively, in order to avoid the situation described before, it is recommendable that the foreign shareholder, instead of assuming debts on behalf of the subsidiary, makes sure the subsidiary is incorporated and afterwards adopts one of the following alternatives: (i) make foreign direct investment (FDI) by increasing the subsidiary's social capital (equity investment); or (ii) grant a loan and afterwards convert the loan into equity (debt-to-equity swap).

From corporate perspective, both alternatives (FDI and debt-to-equity swap) can benefit the subsidiary/business office by keeping its financial equilibrium and cash flow, consequently avoiding the "thin capitalization" risk and maintaining the newborn Brazilian company financial health.

However, compared to the FDI (equity investment), the debt-to-equity swap has some advantages: a) the shareholder will have more flexibility, since its credit can be converted into equity at any chosen time, changing his role from creditor to shareholder and therefore providing for a better risk management; b) after the swap is done, the subsidiary will have better chances to capture new investments; and c) the risk of commingling of assets between the shareholder and the subsidiary is substantially reduced. On the other hand, from corporate perspective, the drawback of the debt-to-equity swap comparing to FDI consist on the risk of thin capitalization of the subsidiary until the moment when the foreign MNE (investor) swap the debt-into-equity.

From tax perspective, both the debt-to-equity swap and the FDI are not subject to taxation by corporate taxes (IRPJ, CSLL, PIS and COFINS) since neither of them are taxable income. The difference is that, meanwhile the FDI triggers immediately Brazilian Tax on Exchange Transaction at a rate of 0.38%, the debt-to-equity swap does not trigger such tax provided that the term of the loan agreement is longer than 180 days. However, one must keep in mind that retained interest (*i.e.*, interest not yet paid by the borrower) are subject to withholding income tax (IRRF) at the time of the debt-to-equity swap is carried out. Besides, in case an active exchange rate variation occurs at the time of the simultaneous operations, the capital gain generated must be included in the income tax basis.

It is important to notice that in both scenarios – *i.e.*, FDI or debt-to-equity swap – risks associated to thin capitalization arising from certain loan agreements are avoided. From corporate perspective, thin capitalization increases creditors and suppliers' risks of insolvency. From tax perspective, thin capitalization triggers the application of special tax provisions, such as thin capitalization and transfer pricing rules aimed to limit the deductibility for tax purposes of the interests due.

For the reasons exposed, international companies must always carefully analyze and plan how such investments in a subsidiary/business office will be made in the evermore attractive Brazilian market to avoid legal issues, and penalties to its blooming operation.

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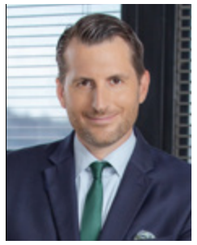

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Taxation of the Digital Age: Challenges faced by OECD lessons for the Brazilian Tax Reform

Since the popularization of the internet, a rapidly expanding worldwide revolution has transformed the old models of mankind communication and behavior, not only in terms relationship but also consumption, work, wealth generation, amongst other. However, governments worldwide are not able to keep up with such speed to ensure tax collection, due to lack of capacity of amending tax regulations within the necessary celerity and still acting with legal certainty and in accordance with its federal constitutions.

For illustrative purposes, some well-known examples affecting daily life can be mentioned, like *Whatsapp*, *Uber*, *Ifood*, *Rappi* and *Airbnb*. The massive use of the application *WhatsApp*, for instance, resulted in a decrease on the use of telephones. In other words, users have been spending money more on data than on conventional phone calls. Consequently, the increase of internet use has as outcome a tendency of a lower collection for Brazilian Tax Authorities, as the communication sector is responsible for a significant portion of the ICMS collection.

Similarly, the taxation on payroll for employees has also been affected, considering that the popularization of applications like *Uber*, *Ifood* and *Rappi* is an actual bottleneck for taxing the income, whereas a registered employee would be subject to withholding income tax on payroll, as well as to Social Security. It is also worth mentioning that the replacement of workmanship by machines also jeopardizes the ability of tax collection.

Another considerable challenge is the new business model regarding accommodation. The hotel chain usually pays taxes on total service revenue. Airbnb in its turn, is subject to the same taxes, however, solely on the revenue deriving from intermediation service (therefore, leading to a reduction of tax bases). In this sense, the most significant portion of the amount paid by the consumer is remitted to the property owner, who will be subject to taxation, usually at the natural person level, what increases complexity for Tax Authorities, in terms of controlling and tracking such income, since it fragments tax collection.

Given such scenario, it is worth mentioning that the Organization for Economic Co-operation and Development ("OECD") is leading multilateral efforts to address such tax challenges, embedded into current digitized global economy. OECD's Secretariat recently published an amended proposal, which was open to public consultation process, to lead international tax negotiations in terms of ensuring large and highly profitable digital Multinational Enterprises ("MNE"), to be subject to taxation wherever the profit is generated and significant consumer-facing activities are held, even without a physical presence in that county.

With the aim of making tax regulations worldwide to consistently fit the purpose for the global economy of the 21st Century, one of the intentions is to re-allocate some profits and its corresponding taxing rights to the jurisdictions where MNEs have their markets and not necessary its tax residence.

The challenges to do so, are addressed by more than a 130 countries that compose the OECD/G20 Inclusive Framework on BEPS discussion tables and also are those that Brazil has to face. Therefore, and taking into consideration that the Brazilian tax environment is in a heated fizz to find the appropriate grounds of its required Major Tax Reform, Brazilian authorities responsible for introducing such reform, could only profit of keeping close ears and eyes to such invaluable discussions, to avoid issuing a stillborn Tax reform. Good news is, Brazil indeed is taking close attention to it.

A high-level seminar on international tax reform was organized in February 2020 in Riyadh (Saudi Arabia), which aimed to collect effective tax from digital technology giants like *Facebook*, *Amazon* and *Google*. The advisor of Minister Paulo Guedes, actively supporting on the Brazilian Tax Reform, Mrs. Vanessa Canado, was among the participants, what indicates that our authorities will be able to apply, or at least inspire, a more educated and internationally aligned tax reform.

There is basically a two-pillar approach addressing the challenges of the digital economy, which require the establishment of new rules stating both the "nexus" rules (where tax should be paid) as profit allocation rules (to what extent such profits should be taxed). Such needs to be a standardized approach among all countries, to avoid the threat of developing countries with small economies, of issuing uncoordinated and unilateral actions that can lead to harmful race to the bottom on corporate tax rates.

In this sense, several countries are seeking for consensus on how to tax, in a fair and rational manner, such growing digital economic activity, deviating from all the parameters hitherto adopted by the OECD treaty model. Thus, considering the large Brazilian consumer market and the fact that Brazil is on its way to become an OECD member (what will require several changes on the Brazilian Tax System) such OECD guidelines will certainly influence the Brazilian Tax Reform.

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