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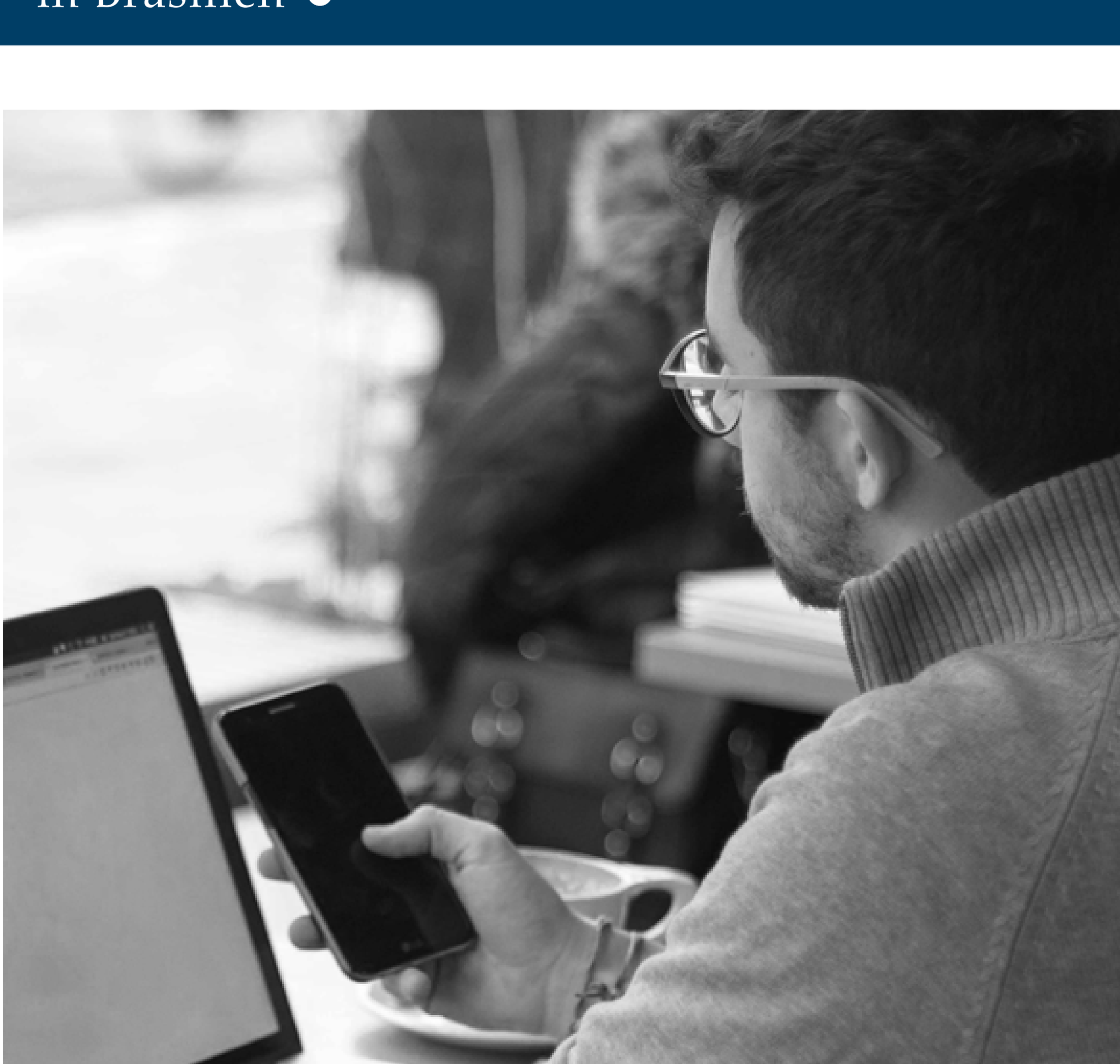
TozziniFreire Advogados

Appointment of the five members of the ANPD's Board of Directors



In a Decree signed on November 5, 2020 and published the following day, in an Extra Edition of the Federal Official Gazette, the 5 (five) members of the Board of Directors of the National Data Protection Authority (ANPD) were appointed.

For the position of chairman of the ANPD's Board of Directors, Waldemar Gonçalves Ortunho Junior, current CEO of Telebras, was appointed for a term of 6 (six) years. For the positions of directors of the Board of Directors, the following were appointed: Arthur Pereira Sabbat, director of the GSI Information Security department, for a term of 5 (five) years; Joacil Basilio Rael, reserve military and computer engineer, for a term of 4 (four) years; Nairane Farias Rabelo Leitão, lawyer and sole representative of the private sector, for a term of 3 (three) years; and Miriam Wimmer, director of Telecommunications Services at the Ministry of Communications, for a term of 2 (two) years.

The Board of Directors is responsible for providing for the ANPD's internal regulations and for appointing the occupants of the ANPD's commissioned positions and trust functions, who will be appointed or designated by the chairman.

Once the Board of Directors is established, ANPD can begin its activities, including those regarding the definition of its structure, guidelines and specific regulations of LGPD (Brazilian General Data Protection Act - Law No. 13,709/2018). In addition to the Board of Directors, ANPD will have as structure other bodies, such as the National Council for Privacy and Protection of Personal Data (CNPDP), Internal Affairs, Ombudsman and Legal Advisory.

Among its duties, it will be up to ANPD to edit regulations on specific points of LGPD, to guide its interpretation, to investigate and apply the administrative sanctions provided for in the Law, which will come into force as of August 2021.

Brazilian President partially approved the Bill of Law No. 4,458, of 2020, which modifies Brazilian Bankruptcy Law

Brazilian President partially approved, on December 24, 2020, the Bill of Law No. 4,458, of 2020, which modifies Law No. 11,101/2005 (Brazilian Bankruptcy Law).

The new Law will be applied immediately to pending proceedings – except for some provisions – and will come into force 30 (thirty) days after its publication in the Official Gazette.

The President vetoed some of the provisions of the text approved by the Senate. The veto and its motivation were submitted to the Brazilian Congress. The veto will be voted in a joint session of the Senate and the House of Representatives, within thirty days from its receipt, and can only be rejected by the vote of the absolute majority of Federal Deputies and Senators. If the veto is not upheld, the bill will be sent to the President of the Republic for promulgation.

THE MAIN CHANGES ARE THE FOLLOWING:

JUDICIAL REORGANIZATION

(i) Stay period: the period of suspension of enforcement proceedings against the debtor and seizure/pledge measures against the debtor for 180 days, counted from the decisions authorizing the Judicial Reorganization Proceeding, may be extended for the same period only once, on an exceptional basis, provided that the debtor did not contribute to the non-compliance with the time lapse.

(ii) Essential assets: the Judicial Reorganization Court has jurisdiction to determine the suspension of seizure/pledge measures that fall on capital assets, essential to the maintenance of the business activity, including those related to credits that are not subject to judicial reorganization (e.g., tax claims).

(iii) Presentation of alternative judicial reorganization plan by creditors: creditors may submit an alternative proposal to the plan submitted by the debtor: (a) if, after the termination of the stay period, there has been no deliberation on it, or (b) to substitute a plan that was rejected by the General Creditors Meeting, provided that the cram down requirements are not met, in which case the Judicial Administrator will open a vote for the possibility of presenting an alternative plan within 30 days. The alternative plan must: (i) contain a detailed description of the means of reorganization to be employed, (ii) have written support from creditors representing, alternatively, more than 25% of the total credits subject to judicial reorganization or more than 35% of the claims of the creditors present at the meeting; (iii) release the guarantees provided by debtors jointly liable by the claim under judicial reorganization; (iv) not impose on the debtor or its partners a greater sacrifice than that which would result from liquidation in a bankruptcy; (v) not to provide for new obligations, not provided for in law or in contracts previously celebrated, to the debtor's partners.

(iv) DIP Finance: the judge may, after hearing the Committee of Creditors, if such committee had been elected, authorize financing agreements to the debtor to fund their activities and the expenses of restructuring or to preserve the value of assets. These financing agreements may be guaranteed by fiduciary lien of assets and/or rights, owned by the debtor or third parties, belonging to the debtor long-term assets. The further modification of the decision that authorized the financing may not alter its non concurrent nature or the guarantee constituted, if the amount has already been disbursed. In addition, the amount delivered by the lender to the debtor under judicial reorganization, as non-concurrent credit, occupies the 2nd (second) position in the order of preference for payment.

(v) Sale of UPIs: the law expressly authorizes: (i) the electronic auction, in person or hybrid; (ii) the organized competitive process, organized by a specialized agent or any other means admitted by court. The sale of assets or granting of guarantee cannot be annulled after the consummation of the transactions.

(vi) Procedural and substantive consolidation: the debtors that meet certain requirements provided for in Article 48 of the Brazilian Bankruptcy Law (and that are part of a group under common corporate control) may request judicial reorganization proceeding under procedural consolidation. With regard to substantial consolidation, regardless of the General Creditors´ Meeting, the judge may authorize it, exceptionally, only when there is interconnection and confusion between the assets or liabilities of the debtors of the group of companies, in a way that it is not possible to identify their ownership. In such case, there must be the occurrence of at least two (2) of the following hypotheses: (i) existence of cross guarantees; (ii) control or dependency relationship; (iii) total or partial identity of the corporate structure; and (iv) joint operation in the market among the applicants.

(vii) Transnational insolvency: Brazil has been adopting the text of the United Nations Commission on International Trade Law (UNCITRAL) model law, proving for international cooperation (chapter VI-A) and regulating cooperation between judges and national and foreign authorities in the event of transnational insolvency.

(viii) Distribution of profits or dividends: the debtor cannot, until the approval of the judicial reorganization plan, distribute profits or dividends to partners and shareholders, in compliance with the rules regarding fraud on creditors.

(ix) Competence of the Creditors Meeting: the Creditors Meeting is competent to deliberate on the sale of assets or rights of the debtor's non-current assets, not foreseen in the judicial reorganization plan.

(x) Abusive vote: the creditor's vote, at the Creditors Meeting, shall be exercised in their interest and according to their judgment of convenience, and may be declared null and void for abusiveness only when manifestly exercised to obtain an illicit advantage for him or for others.

(xi) Conversion into equity: the conversion of debt into equity is now expressly mentioned as a mean of judicial reorganization. The law provides that there will be no succession or liability for debts of any nature to a third creditor, investor or new administrator as a result of, respectively, the mere conversion of debt into capital, the contribution of new resources to the debtor or the replacement of its administrators.

(xii) Full sale of the debtor: the company will be considered a UPI, provided that the creditors that there are not subject to the judicial reorganization receive a treatment equivalent to those they would have in a bankruptcy scenario.

(xiii) Different treatment of supplier creditors: the judicial reorganization plan may treat credits belonging to suppliers of goods or services that continue to provide them normally after the judicial reorganization request differently, provided that such goods or services are necessary for the maintenance of activities, and that the differentiated treatment is adequate and reasonable to the future business relationship.

(xiv) Agribusiness: the regularity of rural activity by a legal entity can be proven through the Tax Accounting (ECF), or through the accounting system that eventually replace the ECF, delivered on time, provided it is done for the two years required by the law. If the farmer is an individual, the proof can be based on the Digital Accounting Book of the Farmer (LCDPR), or through the accounting system that eventually replace the LCDPR, and by the Income Tax Declaration of Individuals (DIRPF) and balance sheet. Only the credits that result exclusively from the rural activity and are discriminated in the above-mentioned documents will be subject to judicial reorganization proceeding.

(xv) Derivatives: the Law provides that the request for judicial reorganization will not affect the exercise of early maturity and offsetting rights in the context of repurchase agreements and derivatives, so that these operations may be matured in advance, provided that this is previously agreed in the agreements entered into between the parties or in regulation. Measures that imply the reduction of guarantees or their foreclosure requirements, the restriction of exercise of rights, including early maturity for non-performance, and the compensation provided for in the contract or in regulation are prohibited.

(xvi) Mediation: new provisions were included seeking to encourage conciliation and mediation, in any degree of jurisdiction. Such forms of composition are also allowed before the judicial reorganization request, in which case companies that meet the legal requirements to apply for judicial reorganization may obtain injunctive relief, so that the enforcements proceedings (stay period) proposed against them may be suspended for up to 60 (sixty) days, in order to attempt to compose with their creditors. If judicial reorganization is requested by the debtor, the term will be deducted from the stay period. In addition, conciliation and mediation on the legal nature and classification of credits, as well as on voting criteria in Creditors Meeting are prohibited.

(xvii) Installment payment of tax debts: the approved wording proposes the extension of the current installment payment of tax debts from 84 to 120 installments, maintaining the rationale that the first installments will be lower than the remaining ones. According to the law, the installments will be calculated as follows: (i) from the first to the twelfth installment: five tenths percent; (ii) thirteenth to the twenty-fourth installment: six tenths percent; and (iii) from the twenty-fifth installment onward, a percentage corresponding to the remaining balance shall be applied in up to ninety-six successive monthly installments. Alternatively, the legislation allows tax debts managed by the Brazilian Federal Revenue (RFB) to be settled up to 30% (thirty percent) of the updated cash value, and the remaining 84 times in installments. This initial settlement may be made by clearing with tax loss, negative base of CSLL and federal tax credits. In the remaining installments, the calculation will follow the progressive rates in the exact terms applicable to the installment plan on 120 times. These forms of installment payment are not applicable to a limited number of taxes (listed in article 14 of Law No. 10,522/2002). In such cases, the wording allows such debits to be paid up to 24 installments, as follows: (i) from the first to the sixth installment: three percent; (ii) from the seventh to the twelfth installment: six percent; and (iii) from the thirteenth installment onward, a percentage corresponding to the remaining balance shall be applied in up to twelve monthly and successive installments.

(xviii) CND for contracting with public companies: it is expressly provided that companies under judicial reorganization will not be required to submit negative certificate of tax debts to promote contracting, including with the Public Power.

BANKRUPTCY

(i) Extension of bankruptcy: the extension of the bankruptcy or its effects, in whole or in part, to the limited liability partners, controllers and managers of the bankrupt company is not allowed. The piercing of the corporate veil of the bankrupt company, for purposes of liability of third parties, group, partner or manager, may only be decreed by the bankruptcy court in compliance with the Civil Code and the Code of Civil Procedure.

(ii) Fresh start: significant modifications were added in connection with the bankruptcy procedure aiming to speed up the collection process and sale of assets and payment of creditors, with special emphasis on the rehabilitation of the debtor to a new business activity.

EXTRAJUDICIAL REORGANIZATION

(i) Labor credits renegotiation: the renegotiation of credits arising from labor accidents requires collective bargaining with the syndicate of the respective professional category.

(ii) Reduction of the approval quorum: the debtor may request ratification of the out-of-court reorganization plan that requires all creditors covered by it, provided that it is signed by creditors representing more than half of the credits of each type.

(iii) Stay period: is applied in out-of-court reorganization exclusively in relation to the types of credit covered by it.

Forest Concessions - Annual Forest Granting Plan for 2021

Upon the enactment of the Public Forest Management Law (LGPF) (Law No. 11,284/2006) and its regulatory Decree No. 6,063/2007, the process of exploration of public forests by private concessions was established.

By means of these concessions, the Federal Government, States, and Municipalities may grant to companies, upon the due public procurement proceeding, the right to carry out the sustainable management of public forests, enabling the rational use of natural resources.

The forest concession is a mechanism created to reduce the irregular and predatory exploitation of public forests and to minimize the occurrence of deforestation, irregular mining, land grabbing and forest fires, among other irregularities that cause undeniable damage to the environment and to the collectivity.

The management bodies must submit to the granting authority the Annual Forest Granting Plan (PAOF) with the description of the public forests that will be submitted to the concession process.

The federal management body is the Brazilian Forest Service (SFB), currently linked to the Ministry of Agriculture, Livestock and Food Supply (MAPA), and PAOF 2021 was established on July 31, 2020, through Interministerial Ordinance No. 348/2020.

According to PAOF 2021, 20 (twenty) national forests were selected as areas potentially subject to forest concession. Thus, the effective management area was estimated at 3.8 million hectares, already disregarding the permanent preservation areas and the absolute reserve areas.

In this scenario, the estimated potential for round wood production in such public forests to be granted in 2021 might reach 1.60 to 2.47 million cubic meters per year, depending on the intensity of the management, which represents 24% to 36% of the total wood produced in the Northern region of Brazil in 2018[1].

As an incentive for the raising of funds by forest concessionaires, Law No. 13,986/2020 (New Agribusiness Law) included among the rural products that can be the object of a Rural Product Note (CPR), those obtained through activities "related to the conservation of native forests and their biomes and the management of native forests under the program of public forests concessions, or obtained in other forest activities that may be defined by the Executive Branch as environmentally sustainable".

In addition, Brazilian development and Government owned financial institutions such as: Banco da Amazônia, Banco do Brasil and Banco Nacional de Desenvolvimento Econômico e Social (BNDES) have credit lines for the development of the "green economy", enabling, for example, the acquisition of machinery and equipment by forest concessionaires.

Thus, there are high expectations for the expansion and strengthening of forest concessions starting in 2021 and the growth potential of the sector in the country is undeniable.

1 Data extracted from PAOF 2021, available at: http://www.florestal.gov.br/documentos/publicacoes/4567-paof-2021-revisao-final-15julho20/file

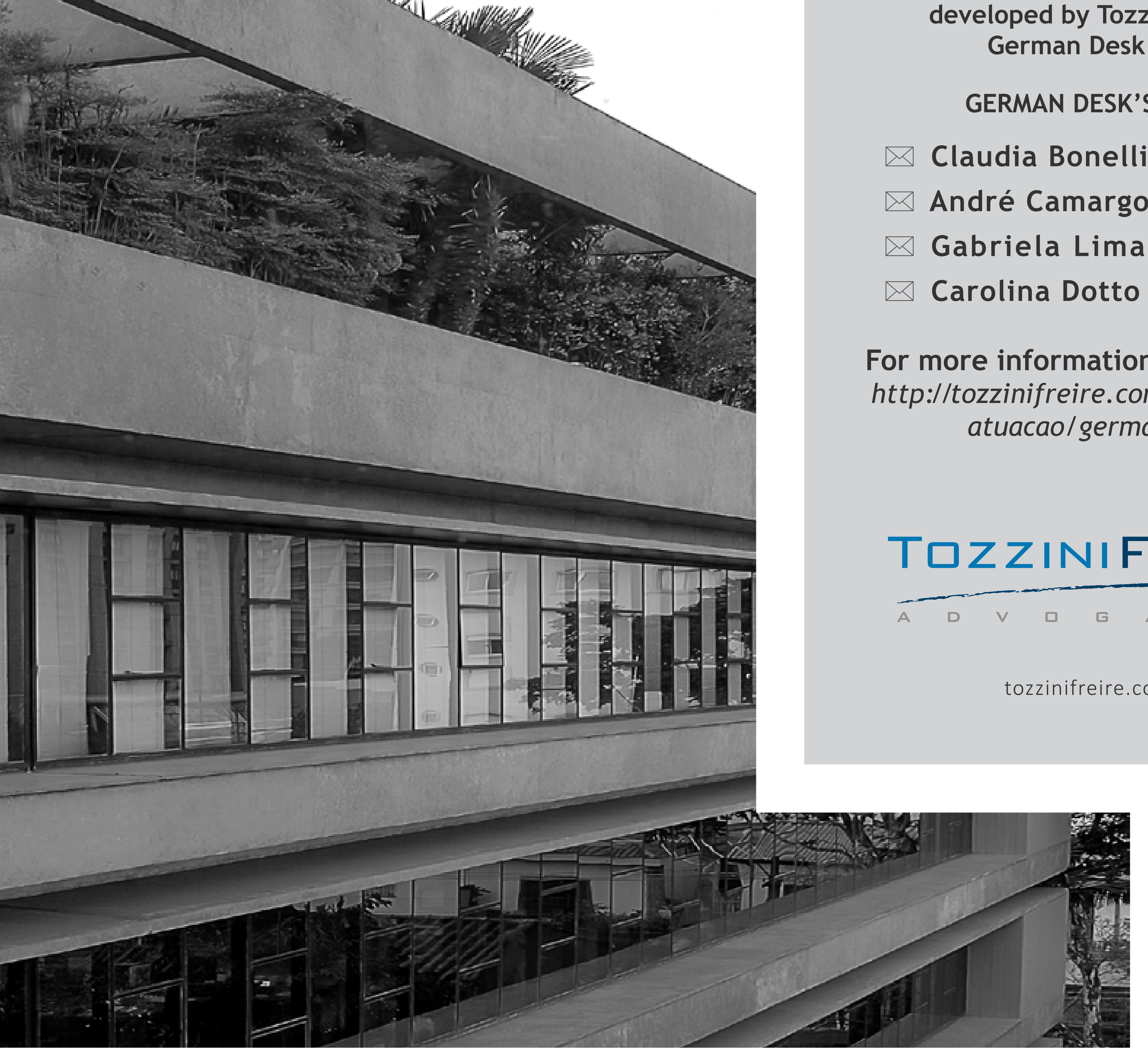
Relevant Changes to Profit or Result Sharing Programs in Brazil

As of November 6, 2020, Law No. 10,101/2000, which regulates the conditions for the implementation of the employees' participation in profits or results of companies, usually known as Profit and Results Sharing Program or simply PLR, is effective with important changes, as indicated below:

- For the PLR implementation, the parties may simultaneously adopt the negotiation modalities of (i) through a joint commission composed by employees chosen by the parties (employees and company) and a representative indicated by the employees' union and (ii) through a collective bargaining agreement.
- When negotiating through a joint commission, the commission must notify the employees' union to appoint its representative within a maximum term of 10 calendar days. If the union representative is not appointed within such term, the commission may start and conclude the negotiation of PLR without the union representative participation.
- The parties may establish multiple PLR programs.
- The parties may freely establish the terms and conditions of PLR. It is possible to determine that the payment of the PLR amount will be linked only to the achievement of individual goals, not being necessary to include company's goals in the PLR program. The autonomy of will of the parties related to the terms and PLR conditions should be respected and will prevail over third parties' interest.
- PLR programs must be implemented within at least 90 days prior to the payment date of the PLR single installment or of the PLR final installment (if the PLR program establishes a payment in advance – i.e., payment of PLR amounts in two installments), and the PLR programs must be implemented before the payment in advance, if any.
- PLR can be paid in up to two times in the same calendar year and the payments cannot occur less than 3 months apart. According to the new rule, failure to observe these frequency rules only invalidates: (a) payments performed after the second payment to the same employee in the same calendar year; and (b) payments to the same employee that occur less than 3 months from the previous payment, in which case the other payments performed will remain valid.

The changes described above had been subject to the veto of the President on the enactment of Law No. 14,010/2020, which regulates the adoption of measures for proportional reduction of working hours and salary and for temporary suspension of the employment agreement during the state of calamity resulting from the COVID-19 pandemic. However, they are back in force after the Congress override the veto. The changes bring clarity in relation to the applicable rules and more certainty for companies and employees in the implementation of the PLR programs, since these matters have been constantly subject to inspections and lawsuits.

PLR programs have been one of the most important instruments for attracting and retaining talents, as they allow payments based on performance to be exempt from labor and social security charges and subject to a lower income tax rate, provided that the legal requirements for its implementation are duly observed.



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