

**TozziniFreire's German Desk Newsletter**

6<sup>th</sup> edition



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**New Brazilian Administrative Misconduct Act with immediate effects**

Law No. 14,230/2021 was enacted on October 26, 2021, amending relevant provisions of Law No. 8,429/1992 (Brazilian Administrative Misconduct Act).

The new law now requires willful intent as a requirement for the characterization of an administrative misconduct, with the exclusion of the misconduct act based on a mere fault, amid other provisions that have been strongly debated. The law was improved to expressly establish that legal entities will be held liable under the regime set forth under Law No. 12,846/2013 (Brazilian Clean Companies Act) and not under the Brazilian Administrative Misconduct Act.

The new law also implements changes in the penalties that may be imposed on those who commit an administrative misconduct. Although increasing the maximum term for the suspension of political rights to up to 14 years, Law No. 14,230/2021 reduces the maximum amount of the fine and establishes that the economic and social effects of the penalties must be considered to allow the legal entity to maintain its activities.

The new provisions also address some procedural issues and establish that the Public Prosecutor's Office is the one with standing to sue in cases of an administrative misconduct. It is now established by the new law that the injunctions for freezing of assets will only be granted upon evidence of irreparable damage or risk to the effectiveness of the lawsuit, contrary to the current case law on the matter.

Settlement with the Public Prosecutor is permitted, but dependent on the full reimbursement of the damages to the Public Treasury and reversion of the illicit advantage obtained by means of wrongdoing. The competent Court of Audit should indicate the parameters for calculating the damage to be reimbursed.

Administrative Misconduct claims for imposition of penalties will be statute barred after 8 years as of the occurrence of the fact, exception made to the reimbursement to the Public Treasury, which is not subject to any statute of limitation period. The new law also established the interim statute of limitation during the course of the lawsuit (i.e., a statute of limitation term that is triggered due to Plaintiff's inertia in moving the proceeding forward after the filing).

Those already responding to administrative misconduct claims may benefit from the changes in the law. Procedural changes will apply immediately to ongoing lawsuits.

**DUAL-CLASS SHARE**

is now permitted in Brazil

Enacted on August 26, 2021, Law No. 14,195 allows Brazilian corporations to issue dual-class shares.

Considered a global trend, countries like France, Italy, USA, Sweden, and Finland already authorize such mechanism, especially for startups and tech companies, particularly to allow their founding partners to remain as controlling shareholders even after investment rounds, including an IPO process and public offerings.

Through a dual-class share mechanism, it is possible for corporations to issue ordinary shares with greater voting power than others of the same class. In practice, this mechanism enables shareholders who hold a small representative portion of the share capital to exercise greater political power in the corporation.

The Law implemented amendments to the Brazilian Corporation Law (Law No. 6,404/1976) to allow each common share to carry up to ten votes each, allowing the exercise of controlling power with less of the majority of common shares (with voting rights).

The Law provides that this "supervote" may remain for a seven-year period, extendable for any additional period, if the majority of shareholders without the right to multiple voting decide in its favor at a general shareholders' meeting. At the end of the original or extended period, dual-class shares will be automatically converted into traditional common shares, returning to have just one vote each.

Also according to the Law, only closely-held corporations or those that have not yet carried out their initial public offering of shares may adopt the dual-class share mechanism.

Please find below other relevant legal rules enacted by the Law:

- Prohibition of incorporation, incorporation of shares and merger operations of a publicly-held corporation that does not adopt a dual-class share mechanism into a corporation that does it;
- Prohibition of the spin-off of a publicly-held corporation that does not adopt a dual-class share mechanism for the setting up of a new company with the adoption of it, or incorporation of the spun-off portion into a company that adopts it;
- Prohibition of the adoption of such mechanism for voting at the general shareholders' meeting that resolves on the management remuneration and the approval of related-party transactions that meet the relevance criteria to be defined by the Brazilian Securities and Exchange Commission;
- The bylaws of the corporation shall establish, in addition to the number of shares of each type and class into which the share capital is divided: the number of votes per share of each class of common shares with voting rights and the duration of the dual-class share mechanism, subject to the limit of seven years;
- The new provisions on dual-class shares will not apply to state-owned companies their subsidiaries and companies directly or indirectly controlled by the Government.

**ANEEL approves the regulation on hybrid and associated power plants**

On November 30, 2021, the National Electric Energy Agency (ANEEL) approved regulation for the operation of Hybrid Power Plants (UGHs) and associated power plants, systems resulting from the combination of two or more energy sources that share the power grid infrastructure. The new resolution provides definitions and rules for the licensing procedure of these projects, contracting the use of the power grid, charging plants and discounts on usage charges.

This specific regulation allowed hydroelectric plants that are part of the Energy Reallocation Mechanism (MRE) to develop hybrid or associated plants, with measurements being separated by generation technology. The energy produced by a source other than hydro, as well as the generation output (garantia física) of such source will not be allocated to the MRE.

It is worth mentioning that the new regulation did not restrict the kind of technology to be used. The regulator preferred not to set forth rules for the formation of hybrid or associated sets that use energy storage at this moment, as the matter will be resolved through a specific process.

Although the discussion on the regulation for the matter started in 2019, there are already some hybrid projects in Brazil today, either installed or under installation phase.

**ANEEL approves the first energy battery storage project in large scale in the transmission grid**

On November 16, 2021, ANEEL approved the first energy battery storage project in large scale in the transmission grid, pioneer for the sector. The concessionaire ISA CTEEP is leading the new venture, investing around BRL 146 million in a system with 30 MW of power to be installed at the Registro substation, in São Paulo.

Due to the project implementation, the Annual Permitted Revenue (RAP) will be approximately of BRL 27 million, with the project expected to be delivered in November 2022.

According to the company, the lithium batteries will be installed in an area of around 4,000 m<sup>2</sup>, with a size equivalent to approximately 30 containers and capacity to ensure the maximum demand of the south coast of São Paulo (around 400 MW), benefiting approximately 2 million people.

The technology will act in moments of peak consumption, as a reinforcement to the grid, ensuring additional energy for up to two hours and avoiding interruption in supply due to excess demand.



IMAGEM: AKARAWUT

**ANEEL initiates public hearing regarding the auction notice proposal for the 2022 transmission auction**

On November 15, 2021, ANEEL initiated the public hearing to discuss the bid notice proposal for the first transmission auction of 2022. The contributions can be received by January 10, 2022.

With investments of BRL 9.5 billion, the auction notice foresees a public bidding of 13 lots, with 4,545 miles of transmission lines and 5,410 MVA in transformation capacity. The auction is expected to occur on June 30, 2022, offering concessions in the States of Acre, Amapá, Amazonas, Bahia, Espírito Santo, Mato Grosso, Mato Grosso do Sul, Minas Gerais, Pará, Rondônia, Santa Catarina, São Paulo and Sergipe.

The lots 1 to 7 will correspond to new projects, while the other lots correspond to already existing projects with recommendations of expiration or ongoing punitive proceedings for breaches of contract. Alterations can occur depending on the final decision given by the Ministry of Mines and Energy regarding the projects with ongoing punitive proceedings.

It is worth mentioning that ANEEL organized, on December 17, 2021, the transmission auction No. 02/2021. In this regard, ANEEL published, on November 23, 2021, the final auction notice of this transmission auction, including the object, the Annual Permitted Revenue (RAP) and the Technical Schedules. In the bidding process, 902 miles of transmission lines will be offered, along with 750 MVA of transformation capacity, in the following States: Amapá, Bahia, Minas Gerais, Paraná and São Paulo.

**ANEEL**

approves rules for economic and financial rebalance of distribution companies

On November 23, 2021, ANEEL approved rules for the analysis of tariff review requests claimed by distribution companies, in order to rebalance concession agreements in view of the events resulting from the COVID-19 pandemic.

The Agency established the calculation criteria of the distributors' involuntary hiring, resulted by the consumption reduction during the pandemic and, also, defined the refund measures to the consumers of costs related to the credit operation of the 2020 COVID-Account.

The rebalance will focus on: (i) the decrease in the revenue caused by market reduction; and (ii) the loss of revenue caused by default's increase. For the purposes of rebalancing, such triggering events must have occurred in the year 2020 and cannot be a result of bad business management. Furthermore, the effects of the revision will be presented in subsequent tariff processes, remunerated by the Selic rate.

Distribution concessionaires will have by January 31, 2022 to send all of the data regarding revenues from March to December of 2020, with consolidated analysis by December 31, 2021, in the rebalancing claims related to the decreases concerning consumers' default.



IMAGEM: ANNIE SPRATT

**Several new legal changes to Brazilian corporate law**

Enacted on August 26, 2021, Law No. 14,195 brought relevant changes to Brazilian Corporate law, aiming to improve the business environment and to improve the country's position in the World Bank's "Doing Business" ranking.

The first set of legal changes aims to ease the setting-up process of companies, mainly through the digitalization of applicable procedures. Please find below a summary of these legal changes:

- The unification of federal, state, and local tax registrations with the National Taxpayer Register of Legal Entities (CNPJ);
- The removal of a prior address search for business purposes;
- The previous verification of trade name on the Internet and optional use of CNPJ identification number as trade name;
- The corporate acts registered with the Registry of Commerce will not require the signature certification by a public notary anymore;
- The signature of the responsibility statement by the company's legal representative for issuing the business licenses may be performed electronically;
- The creation of a federal online system for an immediate consultation on the existence of a trade name, register of sole entrepreneurs, and legal entities without a physical place of business, offering an online and unified service for the payment of fees involved in the business registration process.

The second set of legal changes aims to protect minority shareholders, increasing their decision-making power in certain matters, aligning the Brazilian Corporate Law (Law No. 6,404) with the good corporate governance practices recommended by the World Bank. Among the main changes, we emphasize the following ones:

- For publicly-held corporations, increase from 15 to 21 days for the notice period (and remittance of preparatory information and documents) for scheduling general shareholders' meetings. The purpose of the change is to provide more time to the shareholders to become aware of the relevant information before the meetings. The Brazilian Securities and Exchange Commission (CVM) is authorized to adjourn the meeting for up to 30 days if the relevant documents are not duly disclosed to shareholders;
- For publicly-held corporations, prohibition of accumulation for CEO and Chairman of the Board of Directors positions, a situation considered to be an non-recommended corporate governance practice, respecting the adaptation period of 360 days;
- For publicly-held corporations, the obligation to have at least one independent director in the composition of the Board of Directors, which will be further regulated by CVM;
- The introduction of the dual-class share mechanism in the Brazilian Corporate Law, which is limited to up to ten votes per ordinary share, allowed only in corporations with no shares traded on the capital market yet;
- For all corporations, the permission for officers and board members to officially reside abroad, as long as they maintain an attorney-in-fact in Brazil with the certain powers required by the Law.

Finally, the third set of changes refers to business reduction of bureaucracy, including the simplification and digitization of processes necessary to the exercise of business activities in Brazil, including as new features:

- The transformation of the current solely-owned business form named "EIRELI" into a solely-owned limited liability company (sociedade limitada), a procedure that will be regulated by the Department of Business Registration and Integration (DREI);
- Permission for legal entities to hold general shareholders' meetings remotely by electronic means, ratifying the legal changes enacted during the COVID-19 pandemic;
- Permission that, when the main place of business is virtual, the address provided for registration purposes is the same used by the individual entrepreneur or one of the partners of the business association entity.

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